Supreme Court, U.S.
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NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OSCAR CUNI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OSCAR CUNI, PRO SE,
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22 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court erred in denying relief for ineffective assistance of counsel due to counsel's conflict of interest without an evidentiary hearing, having recognized that said conflict existed.

II

Conflict With the Other Circuits interpreting this Court's decision in Apprendi v New Jersey, 530, U.S. 466, 120 S. Ct. 2348 (2000), when dealing with faulty indictments where the drug quantities are not mentioned in the indictment and presented to a jury.

INTERESTED PARTIES

All parties do not appear in the caption of the case on the cover page. A List of all parties to the proceeding in the court whose judgment is the Subject of this petition is as follows:

Oscar Cuni (Pro Se Petitioner)

Lisette Reid (Asst. U.S. Attorney/Appellate Counsel)

Hon. Marco Daniel Jimenez (U.S. Attorney)

Theodore B. Olson, General Solicitor

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IN THE
SUPREME COURT OF THE UNITED STATES

No.:

OSCAR CUNI,

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UNITED STATES OF AMERICA,

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On Petition for Writ of Certiorari to the
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for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Oscar Cuni, Pro Se, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 98-4988; [D.C. Docket Number 93-00597-CR-KMM], in that court on October 30, 2001, affirmed the ruling of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1) and Part III of the **RULES OF THE SUPREME COURT OF THE UNITED STATES.** The decision of the court of appeals was entered on October 30, 2001. Rehearing was denied on March 15, 2002. This petition is timely filed pursuant to SUP CT. R. 13.3. The court of appeals had jurisdiction pursuant to 28 U.S.C. Section 2191 and 18 U.S.C. Section 3742, which gives the court of appeals jurisdiction over all final decisions and final sentences of the district courts of the United States.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

Sixth Amendment, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel in his defense."

STATEMENT OF THE CASE

The Petitioner wishes to bring to this Honorable Court's attention that he his not an attorney and has no meaningful experience in the practice of law. He asks this Court to notice that he is pro se in this proceeding and, although he has worked diligently to set forth the issues that present themselves most obviously, there may be others lurking within the factual framework and record, hence the Petitioner would request this Court's perception and indulgence in considering fully set forth any issues that are herein illuminated by not specifically isolated and argued as grounds for relief. Accord, Haines v Kerner, 404 U.S. 519, 92

S. Ct. 596, 30 L. Ed. 2d 652 (1972) (allegations in pro se pleading are to be held to less stringent standards than formal pleadings from professional counsel); Rose v. State, 235 So. 2d 353 (Fla. 3rd DCA 1970) (prisoners seeking relief are not held to exactitude in pleading).

Oscar Cuni was originally charged in a 3 counts of a multi-count, multi-defendant indictment. The charges were modified through two superseding indictments. Cuni was arraigned and entered pleas of not guilty to the three (3) counts.

Trial commenced on September 28, 1994, the Honorable K. Michael Moore, United States District Judge, Presiding. Trial continued 8 weeks before going to the jury on November 15, 1994, the jury found Cuni guilty of Counts 1 and 5, and acquitted him of the continuing criminal enterprise charged in Count 2. On January 20, 1995, Cuni filed a motion for new trial, which was amended on May 2, 1995, and denied on June 16, 1995.

On May 24, 1995 Cuni was sentenced to life imprisonment plus 10 years supervised release as to each Counts 1 and 5, running concurrent with each other.

On December 16, 1997, Cuni filed an alternative motion for new trial or dismiss based on newly discovered evidence of prosecutorial misconduct and defense counsel's conflict of interest which was denied without an evidentiary hearing by the district court when approving and adopting the report and recommendation of the magistrate judge on June 4, 1998.

Cuni timely filed his appeal to the 11th Circuit Court of Appeals.

On October 30, 2001, the Court of Appeal affirmed the district court's ruling. Cuni timely filed a motion for rehearing. The rehearing was denied on March 15, 2002. This Petition for Writ of Certiorari follows. Cuni remains incarcerated today.

Post trial Cuni became aware of trial counsel, Michael Blacker was under investigation and formally named in a bill of particulars as an unindicted co-conspirator in the case of United States v. Gonzalez, Case No.: 93-418CR-Graham, all pending during the prosecution of this cause. By keeping these facts secret from Cuni, and the inherent conflict of interest under which Cuni's defense counsel labored during his

representation of him, deprived Cuni his Sixth Amendments right to a fair trial, and effective assistance of counsel.

A defendant's Sixth Amendment right to counsel includes a right to conflict-free representation. United States v. Rogers, 209 F. 3d 139, 143 (2d Cir. 2000), See also Wood v. Georgia, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from **conflict of interest**."); United States v. Levy, 25 F. 3d 146, 152 (2d Cir. 1994).

Cuni's lead trial counsel had actual knowledge that he was a suspect in, and to be named as an unindicted co-conspirator in another pending criminal proceeding (United States v. Gonzalez, Supra), at the time he accepted the engagement as lead defense counsel in Cuni's case. This information was knowingly withheld from Cuni and other defense attorneys. Even when responsibilities were centralized by agreement of the defendants and the Court, on certain pretrial issues. Moreover, the Government also failed to inform the Court and other defense that Mr. Blacker was under investigation; and named as an unindicted co-conspirator in

the simultaneously pending case. The senior prosecutor in the Gonzalez case attended hearings and trial proceedings, occasionally conferring with the prosecutors in this case. At least one of the prosecutors in this case, participated to a currently known degree in the prosecution of the Gonzalez case.

Cuni's trial began on September 28, 1994, and concluded on or about December 15, 1994. On October 18, 1994, Government counsel prosecuting the Gonzalez case filed a bill or particulars formally naming Michael Blacker, Cuni's trial counsel as a unidicted co-conspirator.

Cuni was not aware of his defense counsel's "under investigation" and unindicted co-conspirator status in the Gonzalez case until approximately mid-November, 1997. At the time Cuni became aware of his counsel's involvement he immediately engaged other counsel to investigate and prosecute the motion.

Without conducting an evidentiary hearing, the magistrate judge issued a report on the merits of the motion recommending that relief be denied. Adopting the magistrate judge's recommendations, the district court denied relief.

The 11th Circuit Court of Appeals without the benefit of an evidentiary hearing, adopted the District Court and Magistrate's recommendations that Cuni had failed to show any "adverse effect" from the alleged conflict of interest entitling him no relief from his conviction.

In addition to the conflict of interest claim and contrary to this Court's ruling in Apprendi v. New Jersey, 530, U.S. 466, 120 S. Ct. 2348 (2000), none of the indictments charging Cuni, contained a drug quantity. Cuni further argued that his conviction and sentence must be vacated under the "Plain Error" standard of review.

Cuni's objection to the Government's statement in the pre-sentence investigation that the alleged amount of drugs attributable to him totaled 127 kilograms of cocaine, required the Government to "... support its statement in the pre-sentence investigation with reliable proof by which the trial court can conclude that it was not unlikely that the Government's statement's is true". United States v. Boyd, 2002 U.S. App. LEXIS 9410 (10th Cir. 5/16/02); United States v. Mc Waine, 243 F. 3d. 871 (5th Cir. 2001); United States v. Taylor, 277 F. 3d 721 (5th Cir. 2001); United States v.

Contreras, 249 F. 3d 595 (7th Cir. 2001); United States v. Taylor, 2002 U.S. LEXIS 9451 (9th Cir. 5/14/02).

At Cuni's sentencing, the trial court's findings concerning the drug quantities were generalized and not particular or specific, and are therefore clearly erroneous. United States v. Ching Yu, 285 F. 3d 192 (2nd Cir. 3/25/02); United States v. Wilson, 2000 U.S. LEXIS 21416; 2000 Colo. J. C.A.R. 4950, Case No.: 99-6233 (10th Cir. 2000); United States v. Angle, 230 F. 3d 113 (4th Cir. 2000).

Contrary to this Court's ruling in Apprendi, Supra, and in direct conflict with other Appeal Courts, the 11th Circuit Court of Appeals denied Cuni any relief. Rehearing was denied. A copy of the order denying relief is contained in Appendix (A-2).

REASONS FOR GRANTING THE WRIT

The panel's decision recognized Cuni's claim that his trial attorney represented him under a conflict of interest: "information was insufficient to permit the court to find that no actual conflict exited." (11th Circuit's opinion, United States v. Mercedes Novaton. Humberto Rodriguez, (No.: 95-4445) at page 37, see Appendix A-1-64). However, the court refused

to recognize what has been obvious, and affirmed by this Court for many years, and guaranteed by the Sixth Amendment, which includes the "right to representation that is free from conflict of interest". Atley, 191 F. 3d at 869 (citing Wood v. Georgia, 450 U.S. 261 at 271, 67 L. Ed. 2d 220, 101 S. Ct. 1097); "When burdened by a conflict of interest, counsel 'breaches the duty of loyalty, perhaps the most basic of counsel's duties' and, therefore, fails to provide effective assistance of counsel." Id. (citing Strickland v. Washington, 466 U.S. 668, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Holloway v. Arkansas, 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978); Cuyler v. Sullivan, 446 U.S. 335, 346, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).

Standing the prejudice analysis of Strickland on its head, the Eleventh Circuit panel's decision engages in a performance analysis to hold that the petitioner cannot show prejudice in his trial counsel's conflict of interest. Undertaking without the petitioner having the benefit of a hearing, and without an evidentiary basis, the court of appeal seriously misapplies Strickland.

The factual basis for Cuni's claim relates to the

connection between his lead trial counsel, Michael Blacker, and a conspiracy charged in an unrelated case in which Blacker was counsel for a different defendant (named Martin). On October 18, 1994, approximately three and a half weeks after the trial in this case began, Blacker was served with a bill of particulars in that case, and in it, the Assistant United States Attorney indicated that:

> "[D]efendants have also been provided with substantial discovery which identifies essentially all the conspirators (emphasis added). Nevertheless, in an abundance of caution and to the extend that defendant MARTIN has not read the discovery, the government will restate those individuals, other than the charged co-conspirators, who may have furthered the objectives of charged conspiracy: .... Michael Blacker."[1]

The government maintains that despite this statement in the bill of particulars, Cuni's attorney did not have a conflict

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[1]In the Gonzalez case, along with Michael Blacker, two more attorneys were named in the bill of particulars that named Mr. Blacker. These attorneys were indicted. Geraldo Remy, who plead guilty and testified for the government and Frank Quintero who fought his case and won. Mr. Blacker, after Cuni's trial was dismissed from the investigation in the Gonzalez case. Coincidences?

of interest because he was not under investigation by the United States Attorney's Office.[2] In support of its position, the government provided a copy of notes taken by an attorney who represented Blacker during the June 1995 meeting [that occurred over 6 months after the end of the trial in this case] with the Assistant United States Attorney. The notes indicate that Blacker's lawyer was advised during the meeting that Blacker was not a target of any investigation and that no indictment was contemplated against him.[3] In light of the facts, and WITHOUT AN EVIDENTIARY HEARING, the magistrate judge recommended that Cuni's motion for a new trial or dismissal be denied. The district court adopted that recommendation. According to the court of appeals, in order to prove adverse effect,

> "a [d]efendant must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that]

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[2]At the time of the meeting, the case was dismissed.

[3] Since September 1993, Mr. Blacker was under investigation by U.S. Attorneys Paul Pelletier and Alexander Angueira, for money laundering in the Gonzalez case (Case No.: 93-418-CR-GRAHAM). (See Appendix A-6).

might have been pursued.[4]

> Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [defendant] need not show that the defense would necessarily have been successful if [alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative.[5] Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with our not undertaken due to the attorney's other loyalties or interest."

Freund, 165 F. 3d at 860 (citations and quotations omitted). In the absence of a showing of an "adverse effect," prejudice is

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[4] Cuni clearly stated that if he had known of Mr. Blacker's divided loyalties, he immediately would have changed lawyers.

[5] Cuni makes reference to the initial paragraph of this Petition "Statement of the Case", where he brings to this Court's attention the fact that he is unlearned in the field of Law, thus he solely relied on his attorney's expertise and advice to present the issues. Moreover, it should be noted that Cuni not only informed his Appellate attorney of all the inconsistencies, actions/lack of actions on behalf of Mr. Blacker, but also provided documents supporting his allegations.

not presumed to flow from a conflict of interest. Id.[6] in their applications of the standards to the fact of this case, the court reasons:

"First, we consider whether an 'actual conflict' has been shown. As we noted in Freund, the inquiry into the existence of an actual conflict is 'fact-specific'. 165 F. 3d at 859. Based on the evidence in the record, we cannot determine whether or not an 'actual conflict' existed." (Emphasis added).

The only evidence that the district court had before it on the issue was the bill of particulars indicating that Blacker might (the court erroneously used the word "might" when it was a fact Mr. Blacker was, an unindicted coconspirator) be an unindicted co-conspirator, and the presentation, based on Blacker's attorney's notes from a meeting that occurred over six months after the end of the trial in this case, that Blacker

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[6]Cuni was presented with a Pre-Sentence Investigation Report (PSI), which contained 99 issues. Mr. Cuni objected to 66 of the issues, claiming that the issues; either contained false information or they were inaccurate. Instead of following Cuni's request, Mr. Blacker, without Mr. Cuni's consent, and knowledge only objected to 9 issues in the PSI. It is worth mentioning, as the prosecutor later did, that issues not objected in the PSI by Mr. Cuni meant that Mr. Cuni agreed them to be true and correct.

was not a target of any investigation,[7] and was not expected to be indicted. We believe that his information was insufficient to permit the court to find that no conflict existed. In particular we note that reliance on the notes from the June 1995 meeting between Blacker's attorney and the Assistant United States Attorney are not persuasive because they apparently reflect only information that was given to Blacker after the conclusion of Cuni's trial in this case. Those notes do not indicate that no conflict existed earlier that should have been disclosed to Cuni and the district court." (11th Cir. Opinion, United States v. Mercedes Novaton, pg. 37, see Appendix A-1-64).

In denying Cuni's claim the court holds that Cuni "has not, and cannot, show his attorney's performance was "adversely affected" by the conflict.[8]

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[7]At the time Mr. Blacker was under investigation in the Gonzalez case, Supra, he was also being investigated in the Nelson Hernandez case in Pennsylvania, Case No.: 43190-006. Once Hernandez became aware of Mr. Blacker's problem, he [Gonzalez] filed a motion proving Mr. Blacker's conflict of interest. On March 20, 1996, Circuit Judge Weis, reversed and remanded the case to the District Court for an evidentiary hearing on the ineffective assistance of counsel claim.

[8] In their opinion, footnote No. 11, (A-1, pg. 80), the 11'h Circuit, mentioned that Mr. Cuni had another attorney at trial, Mr. Villalobos, who did not suffered from any conflict of interest. What the court failed to

Cuni has made absolutely no showing of any adverse effect resulting from his attorney's alleged conflict of interest, much less any 'plausible alternative defense strategy or tactic' that was 'reasonable under the facts.' See, Freund, 165 F. 3d at 860."[9] According to the court:

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notice was that Mr. Blacker was the "Lead Attorney who called all the shots" and thus directly controlled Mr. Cuni's defense. Moreover, it was with Mr. Villalobos' assistance that Mr. Cuni prepared the objections to the PSR Objections that Mr. Blacker later rejected and substituted without Cuni's consent or knowledge. Stoia v. United States, 22 F. 3d 766 (7th Cir. 1994). There, Stoia had Three (3) attorneys: Wolfson, Walters, and Flynn, whom were free of conflict, but since the conflicting attorney, Raymond Takiff, was lead counsel, the court reversed and remanded for an evidentiary hearing, procedure the district court did not follow in Cuni's case.

[9]Contrary to the opinion in Cuni's case, the 11th Circuit recognized in Duncan v. Alabama, The harm caused by conflicting interest; "is difficult to measure, because harm 'is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pre-trial plea negotiations and in the sentencing process.' " 881 F.2d 1013, 1016 (11th Cir. 1989) (quoting Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1182, 55 L. Ed. 2d 426 (1978), of course, the harm may also lie in what the advocate actually does when pursuing a certain strategy that he might not have done under an alternative strategy; this type of harm is also difficult to measure. Given this difficulty, the court is not supposed (as it did in Cuni's case) to engage in "unguided speculation" in either of these situations in order to quantify the degree to which the actual representation received by the petitioner differed from the representation that he hypothetically could have received if represented by conflict free counsel.

> "the closest Cuni comes to articulating any adverse effect is a statement that he would have dismissed his attorney if he had been informed of the possible conflict, and a conclusory allegation that his attorney absented himself from the trial in this case in order to defend his own interest in the case in which he was named as a possible, unidicted co-conspirator. While the latter allegation might be a cause for concern if there were any factual basis supporting it, there is none."

In addition, in the court's own review of the record the panel is "convinced" that Cuni's representation was not adversely affected by the possible conflict of interest. As the magistrate judge pointed out,

> '[t]his record is replete with examples of vigorous and relentless [ ] attacks by Blacker on the government's case and its agents.' In particular, Blacker argued that Agent Lucas the agent who filed affidavits in support of the "various wiretaps, made intentional or reckless misrepresentations in support of the applications, Blacker also challenged the competence of the agents who monitored the wiretaps, and argued that those agents misunderstood the recorded statements. We agree with the magistrate judge that this aggressive approach could hardly be seen as an

effective way for an attorney to curry favor with the government."

In their decision, the 11th Circuit overlooked the fact that the District Court has an inquiry obligation when, during the course of a criminal proceeding to which the defendant has a right to counsel, the court "is sufficiently apprised of even the possibility of a conflict of interest, the court ...has an 'inquiry' obligation," Levy, 25 F. 3d at 153, and must disqualify the attorney or obtain a waiver from his of her client if the inquiry reveals that an actual or potential conflict exists, see. Id. See also, United States v. Lussier, 71 F. 3d 456, 461 (2d Cir. 1995) (When a district court learn of even the possibility of a conflict of interest, it must inquire into the details of the attorney's interest to determine whether the conflict is actual, potential, or nonexistent."), cert. denied, 517 U.S. 1105, 134 L. Ed. 2d 474, 116 S. Ct. 1321 (1996). "The Sixth Amendment requires automatic reversal .... When a trial court fails to conduct an inquiry after either a timely conflict objection, or if the court knows or reasonably should know [that] a particular conflict exists." Claims of counsel's conflict of interest that do not qualify as per se or actual are ordinarily treated as "potential" conflicts. In order to prevail on such a

claim, the petitioner must establish both that counsel's conduct fell below an objective standard of reasonableness and that but for this deficient conduct, the result of the trial would have been different, under the familiar standard established by Strickland v. Washington, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See Briguglio v. United States, 675 F. 2d 81, 82 (3d Cir. 1982) (holding that where trial counsel was under investigation by same United States Attorney's office that was prosecuting counsel's client, evidentiary hearing was required to determine if "counsel labored under an actual conflict of interest, whether any such conflict may have affected the adequacy of his representation, or whether [the client] was prejudiced by his counsel's difficulties."); United States v. McLain, 823 F.2 1457, 1463-64 (11th Cir. 1987) (holding that when trial counsel was under investigation by same United States Attorney's office that was prosecuting counsel's client, under circumstances presented, an actual conflict of interest existed); cf. Levy, 25 F. 3d at 156 (holding that a conflict based on the attorney's status as a defendant under an unrelated criminal proceeding amounted to an actual conflict of interest). There is an actual conflict

between lawyer and client "when during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.' " Winkler v. Keane, 7 F. 3d 304, 307 (2d Cir. 1993) (quoting Cuyler, 446, U.S. at 356 n.3).

By agreeing with the "dog and pony" show Blacker put on for the benefit of the court, and without an evidentiary hearing, were all parties would have been called to testify, the court of appeals denied relief.

The 11th Circuit stands in contrast to well develop precedent of this Court establishing that "full and fair" fact finding must occur on a constitutional claim.

In Townsend v. Sain, 372 U.S. 293 (1963), Chief Justice Warren's opinion for the Court to identified a strong federal policy favoring hearings, or at least sufficient fact-finding procedures, because "detention...obtained '[in violation of the Constitution] is intolerable" and because "the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." Id., 372 U.S. at 312. Townsend also stands for the principle that whenever "there is a reasonable likelihood that

the production of evidence will make the answer to the [constitutional] questions clearer," (citation omitted), the "essential facts should be determine before passing upon [them] ..." Id. 372 at 311.

If petitioner's Sixth Amendment ineffectiveness is true, the only way to determine these matters and "make the answer to the [constitutional] questions clearer, is to conduct a hearing. Townsend attributed to him under the United States Sentencing Guidelines ("USSG") was a level 12.[10]

The USSG (1995) mandated a level 12 base offense level when a conviction was predicated upon less than 25 grams of cocaine.

The rule in the 11th Circuit is that when there is no basis in the record for the district court's determination that a defendant possessed in excess of a specified quantity of

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[10]The 11th Circuit Court of Appeals overlooked the fact that Mr. Cuni objected below to the drug quantity level, asserting that the highest offense level that could be 10. The objection was made by both of Cuni's counsel and the fact that co-defendants made similar objections to the drug offense level, and the standing rule throughout the lower court proceedings was "an objection by one was an objections by all", unless a particular defendant opted out of the objection voiced. Co-defendant Reynaldo Rodriguez also objected to the drug offense level, expressing that the highest level attributable to him likewise was a level 12.

cocaine, that defendant must be sentenced to the lowest Guideline level for the particular cocaine involved in the prosecution, which yields a Guideline base offense level 12. United States v. White, 11th Circuit No. 00-11447, decided January 19, 2001 (unpublished).

It is equally the unqualified ruled in the 11th Circuit that the government bears the burden of providing the amount to be used at sentencing. United States v. Lawrence, 47 F. 3d 1559, 1566 (11th Cir. 1995).

As a result of this Court's decision in Apprendi v. New Jersey, 530, U.S. 466, 120 S. Ct. 2348 (2000), "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt....In federal prosecutions, such facts must also be charged in the indictment." Id. At 476. (quoting Jones v. United States, 526, U.S. 227, 243 n.6 (1999).

In United States v. Ramirez, ___F. 3d ____, 2001 Fed. App. 0043P (5th Cir. No.: 98-6130, decided February 16, 2001) (" ... when a defendant is found guilty of violating 21 U.S.C. Section 841 (a) (1), he must be sentenced under 21

U.S.C. Section 841(b) (1) (C) unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amount required by Section 841 (b) (1) (A) and Section 841 (b) (1) (B). Because in this case the government did not charge or attempt to prove to the jury a quantity of drugs that would permit a mandatory sentence, we remand this case to the District Court with instructions to sentence the defendant under 21 U.S.C. Section 841 (b) (1) (C) and in accordance with the U.S. Sentencing Guidelines."); United States v. Meshack, 225 F. 3d 556, 576 (5th Cir. 2000) (holding that a sentence must be vacated when it is beyond the statutory range of the greater offense supported by the facts found by the jury).

Based on the foregoing decisions, the following principles must control but appear to have been overlooked by the panel: first, Apprendi requires that the examination of the penalty provisions of criminal statutes to determine whether a fact must be charged in an indictment and proved beyond a reasonable doubt irrespective of perceived or demonstrated legislative intent. Second, any fact, other that prior conviction, which increases the maximum punishment for an offense must

be charged by the grand jury and proved beyond a reasonable doubt. Third, the drug quantities contained in the schedule of maximum sentences set forth in 21 U.S.C. Section 841 (b) determine the maximum sentence exposure facing a defendant, and therefore must be charged by the grand jury and proved beyond a reasonable doubt. Fourth, an indictment charging a violation of 21 U.S.C. Section 841 (a) which does not specify the quantity of the controlled substance states an offense with a maximum penalty that cannot be enhanced pursuant to Section 841 (b) by reference to any quantity of drugs. Fifth, a defendant who is convicted of an indictment which is silent as to the quantity of drugs is exposed only to the maximum sentence supported by the jury's findings, that is, to the greatest sentence prescribed by the statute without reference to drug quantity. Sixth, the Unites States Sentencing Guidelines effective 1995 require that the Guideline sentence be that of a base level 12.

In overlooking the foregoing, the panel decision of the 11th Circuit violated Cuni's Fifth Amendment rights to indictment by grand jury and due process and Sixth Amendment rights to a fair trial by jury. It also resulted in a

sentence by a court lacking subject matter jurisdiction, having acted on the indictment, which failed to allege an offense against the United States. United States v. Brown, 995 F. 2d 1493, 1505 (10th Cir. 1993). United States v. Prentiss, 206 F. 3d 960, 976-77 (10th Cir. 2000); United States v. Hoang Van Tran, 234 F. 3d at 808-09 (citations and quotations omitted).

Since the failure to articulate a quantity of the controlled substance is a total omission of an essential element of the offense charged against Cuni, there is a jurisdictional defect requiring dismissal of Count 1. The dismissal of Count 1 is fatal to the conviction and sentence for Count 5, which accordingly also must be vacated and dismissed.

Assuming without conceding that the 11th Circuit panel's decision properly utilized the "plain error" standard of review as opposed to the "preserved error" standard of review that Cuni asserts in the above section, his conviction and sentence must be vacated. The 11th Circuit's decision is in conflict with the decisions of other circuit courts that have determined that the failure to submit the determination of drug quantity to the petit jury constitutes "structural error" and "is per se prejudicial" or "plain error." United States v. Rogers,

228 F. 3d 1318, 1327-28 (11th Cir. 2000) (A defendant cannot waive the government's failure to prove an element to the jury - a defendant need not object to obtain review of an Apprendi error on direct appeal.)

Even under the "plain error" standard of review, Candelario, 240 F. 3d 1300, 1310 (11th Cir. 2001), the 11th Circuit overlooked the legal precedent in addressing the third prong of the plain error analysis: "Whether the error effected the defendant's substantial rights?" What the panel decision overlooked is that the Defendant's "substantial rights" entailed far more than addressing the question as to whether or not "the record contains finding with respect to drug quantity." United States v. Swatzie, 228 F. 3d 1278, 1282-83 (11th Cir. 2000); United States v. Nealy, 232 F. 3d 825, 830 (11th Cir. 2000). That is to say, assuming both the existence of subject matter jurisdiction and the absence of the court's conflicting decisions, Swatzie and Nealy, standing on their own are both flawed. Their flaw lies in their focus on too narrow a front in addressing the issue of "error affecting the defendant's substantial rights." Cuni's substantial rights were and are adversely effected by virtue of the (i) indictment's failure to

plead a specified quantity, (ii) government's failure to plead he specified quantity, especially as to Cuni about whom there was no evidence of possession of cocaine whatsoever, (ii) trial court's failure to instruct the jury on its necessity to make a finding of drug-quantity beyond a reasonable doubt, and (iv) jury's failure to make a finding of drug quantity beyond a reasonable doubt. The is no way for the jury to have found that the offense involved for the jury to have found that the offense involved at least 5 kilograms of cocaine because no quantity was charged in the indictment and no instruction was given to the jury on the issue of quantity and of its need to make a finding beyond a reasonable doubt. Cuni's "substantial rights" were also effected by (v) the Court's proceeding to judgment and sentence in the absence of subject matter jurisdiction resulting from the indictment's failure to plead an essential element of the offense-quantity.

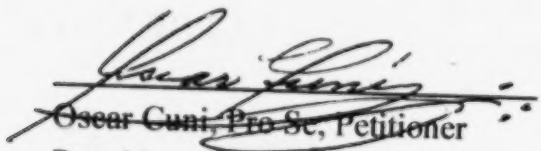
Contrary to this Court's recent decision in United States v. Cotton, 535 U.S. _____, (2002), there were **no** drugs found in the search of Cuni's home and/or businesses. Moreover, other than the "officers hypothetical" interpretation of a conversation between Cuni and someone else, there is no

direct or indirect evidence that can connect Mr. Cuni to any drugs.

CONCLUSION

Based on the foregoing petition, this Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

RESPECTFULLY SUBMITTED,



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APPENDIX

APPENDIX A-1

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-4445

D.C. Docket No. 93-00597-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MERCEDES NOVATON, HUMBERTO RODRIGUEZ, a.k.a. Chino Rodriguez, et al.,

Defendants-Appellants.

No. 98-4988

D.C. Docket No. 93-00597-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR CUNI,

Defendant-Appellant.

No. 98-5045

D.C. Docket No. 93-00597-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON ROSELL, a.k.a. Papito, OSCAR CUNI, et al.,

Defendants-Appellants.

Appeals from the United States District Court

for the Southern District of Florida

(October 30, 2001)

Before ANDERSON, Chief Judge, CARNES and OAKES [1], Circuit Judges.

CARNES, Circuit Judge:

Appellants Francisco Novaton, Oscar Cuni, Jorge Lopez, Reynaldo Rodriguez, Mercedes Novaton, Leopoldo Rodriguez, Felipe Matamoros, Ramon Rosell, and Humberto Rodriguez were convicted of various drug-related crimes that took place in 1993. They appeal, raising numerous issues regarding their convictions and sentences. We reverse the conviction of

Ramon Rosell based on his involuntary absence from critical portions of the trial, and we also remand the case involving Reynaldo Rodriguez in order for the district court to attempt to reconstruct some missing exhibits of the record that apparently relate to one of his contentions. Otherwise, we affirm all of the convictions and sentences.[2]

I. BACKGROUND

A. FACTS

In September 1993, the Drug Enforcement Administration and the Miami Police Department learned of a cocaine distribution operation in which kilogram-sized bricks of cocaine were being sold from a duplex in Miami. Investigators discovered that Appellant Mercedes Novaton was the record owner of the duplex, and that she lived there with her husband Appellant Francisco Novaton, her mother, and two teenage children.

On October 5, 1993, investigators installed video surveillance equipment across the street from the Novaton residence. Later in October 1993, the agents investigating the Novaton residence obtained authority to intercept wire communications on various telephones used by people who were suspected of participating in the conspiracy to distribute cocaine. During the course of the investigation, the agents monitored over 7,000 telephone calls (approximately 4,000 of which were transcribed). During many of the telephone calls, the co-conspirators used code words when referring to cocaine or to money.

By monitoring the intercepted conversations and by

conducting other surveillance, the investigators learned that several co-conspirators were engaged in the distribution of cocaine through various houses in Miami, including the Novaton residence. The agents also learned that two Miami police officers were involved in the cocaine operation. Surveillance showed that Officers Jorge Lopez and Reynaldo Rodriguez, both of whom are appellants in this case, made frequent visits to the residence (sometimes several times per day). The surveillance camera showed that police cars would drive by the residence throughout the day, and would slow down as they passed. The Novaton residence also received calls from a telephone within the Miami Police Department located in a unit adjacent to Jorge Lopez's office.

By monitoring intercepted conversations, the agents were able to obtain information concerning the timing of certain drug transactions, and, on several occasions, the agents seized drugs from purchasers after they left the Novaton residence. On October 23, 1993, Appellant Ramon Rosell was observed bringing three kilograms of cocaine to the Novaton residence. The agents then followed two purchasers named "Tuna" and Jamie Jones after they left the Novaton residence carrying a brown paper bag. The agents stopped Jones' vehicle, and seized the package containing three kilograms of cocaine. Following this arrest, Mercedes Novaton called Francisco Novaton, who was at a race track with Officers Rodriguez and Lopez, to tell him that Jones had been "caught with three." At that point, Novaton returned to his residence with the two police officers. The video surveillance showed that Officer Lopez then walked up and down the street in front of the

Novaton residence. Lopez also called to find out information concerning the company that had towed the seized car.

On October 26, 1993, the agents learned of another cocaine transaction that was about to take place at the Novaton residence. After the purchaser left the Novaton residence, the agents followed him to a different, nearby residence. The agents searched the house, after obtaining consent, and found four kilograms of cocaine. Shortly thereafter, the agents intercepted telephone calls in which Francisco Novaton discussed this seizure with a co-conspirator. Officer Lopez called the Miami Police Department on that day and asked for a check of police activity at the Novaton residence.

On November 1, 1993, agents intercepted a telephone conversation between Appellant Humberto Rodriguez and Francisco Novaton in which Novaton asked Rodriguez to bring over "two cousins" and "two nieces." In a call on the following day, Novaton and Rodriguez discussed "the green stuff" and "lettuce." The agents testified that these were coded references to cocaine and to money.

On November 6, 1993, the agents monitoring the Novaton residence received information about another impending transaction. They observed an individual named Jose Verona arrive in a pickup truck at the Novaton residence. Afterwards, Appellant Felipe Matamoros left the residence for a few minutes and then returned with a white bag. Appellant Leopoldo Rodriguez also arrived at the Novaton residence at about the same time, and he too was carrying a white bag. Matamoros and Rodriguez placed these bags in Verona's

truck, and Verona left the Novaton residence. Verona returned home, and took both bags into his house. He then got back into his truck with one of the bags and drove away. After observing this activity, the agents had the police stop Verona, ostensibly for speeding, and discovered eight kilograms of cocaine in the bag he had.

On November 9, 1993, the agents monitored a telephone conversation between Mercedes Novaton and Officer Reynaldo Rodriguez, in which Novaton asked for information about the November 6 seizure. Rodriguez then came to the Novaton residence with information concerning it.

Investigators learned during the course of the investigation that Appellant Oscar Cuni, who was the owner of a bar named the "Bowl Bar," was a primary supplier for the cocaine operation run from the Novaton residence. On October 31, 1993, the agents intercepted a telephone conversation in which Cuni called to discuss Novaton's purchase of sixty-five kilograms of cocaine (referred to as a "fifteen year old niece" and a "fifty year old grandmother"). Four days later, Cuni was observed leaving the Novaton residence and driving to a different house. Agents observed Cuni removing a box and bag from his car which he gave to some people he met in front of the house. The box and bag were placed in the trunk of the individuals' car. At that point, Cuni appeared to sort and count money in the trunk of the car.

On several occasions, Officers Lopez and Rodriguez were observed providing escorts to individuals who were coming or going from the Novaton residence. On one occasion, a

conversation between Cuni and Francisco Novaton was intercepted in which Cuni informed Novaton that he did not need protection from Officer Lopez on that particular day.

Officer Rodriguez also took steps on at least one occasion to determine whether the Novaton organization was under investigation. On November 17, 1993, he made a report of phantom drug delivery by other individuals in an effort to identify the undercover cars used by the police to investigate suspected drug deals.

On November 20, 1993, Officers Rodriguez and Lopez again demonstrated their involvement in the conspiracy. On that day, surveillance and wire intercepts suggested that an individual named Junior Ayala planned to go to the Novaton residence to pick up drug proceeds from an earlier delivery. After departing, Ayala called Mercedes Novaton and informed her that he sensed that he was being followed, and had abandoned the car with the drug proceeds still in it. Novaton called her husband and Officers Lopez and Rodriguez to come help. Ayala and the proceeds were eventually successfully recovered and returned to the Novaton residence by the officers. That night, Rodriguez was treated to free food and drinks (and allegedly prostitutes) by Cuni at his Bowl Bar. The government contends that Rodriguez admitted in a post-arrest statement that he knew Ayala's car contained drug proceeds, but Rodriguez denies having made such a statement.

In the early morning hours of December 13, 1993, the agents executed a search warrant on the Novaton residence. Francisco and Mercedes Novaton were in the house. The agents found a

scanner tuned to police frequencies on which they could hear the communications of fellow officers who were searching other locations in connection with this investigation. The agents also located 4.1 grams of cocaine in the Novaton residence.

B. PROCEDURAL HISTORY

On May 27, 1994, a federal grand jury returned a 15-count, second superseding indictment charging these nine appellants and eight other defendants with various drug-related offenses. The indictment charged all of the defendants with conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 (Count 1). Francisco Novaton and Cuni were charged with operating a continuing criminal enterprise in violation of 21 U.S.C. §§ 848 (Count 2). Francisco Novaton, Lopez, Reynaldo Rodriguez, Rosell, Mercedes Novaton, Humberto Rodriguez, Matamoros, and Leopoldo Rodriguez were charged with possession of cocaine with intent to distribute on October 23, 1993, in violation of 21 U.S.C. §§ 841(a)(1) (Count 3), and the Novatons, Humberto Rodriguez, Leopoldo Rodriguez, and Matamoros were charged with committing that same crime on October 26, 1993 (Count 4). Those appellants were also charged, along with Cuni, with possession of cocaine with intent to distribute on October 31, 1993 (Count 5). The Novatons, Lopez, and Reynaldo Rodriguez were charged with possession of cocaine with intent to distribute on November 6, 1993 (Count 6). Francisco Novaton and Leopoldo Rodriguez were charged with possession of cocaine with intent to distribute on November 7,

1993 (Count 7). Francisco Novaton was charged with possession of cocaine with intent to distribute on November 18, 1993 (Count 8). Lopez and Reynaldo Rodriguez, the two Miami police officers who are appellants, were each charged with knowingly carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. §§ 924(c)(1) (Counts 9 and 10). The indictment also charged some defendants who are not appellants in some of those counts and also in several additional counts. Finally, the indictment included 17 forfeiture counts against these appellants and other defendants.

The appellants were tried jointly beginning on September 28, 1994 and ending on November 21, 1994. During the trial, the district court granted some of their motions for acquittal on certain counts of the indictment. On December 15, 1994, after 16 days of deliberations, the jury returned the following verdict as to the appellants:

Francisco Novaton: guilty on Counts 1-7;

Oscar Cuni: guilty on Counts 1 and 5, not guilty on Count 2;

Jorge Lopez: guilty on Counts 1, 3-6, and 9;

Reynaldo Rodriguez: guilty on Count 1, not guilty on Counts 3, 6, and 10;

Mercedes Novaton: guilty on Counts 1 and 3-6;

Ramon Rosell: guilty on Counts 1, 3, and 5;

Humberto Rodriguez: guilty on Counts 1 and 5, not guilty on Counts 3 and 4;

Leopoldo Rodriguez: guilty on Counts 1, 3, and 7;

Felipe Matamoros: guilty on Count 1, not guilty on Counts 3-5.

Thus, all of the appellants were convicted of the conspiracy count (Count 1), and all except Reynaldo Rodriguez and Matamoros were convicted on additional counts.

Following sentence hearings, the district court sentenced the appellants as follows:

Francisco Novaton: 360 months of imprisonment on each count to run concurrently, five years of supervised release as to Count 2, eight years of supervised release as to Counts 3 and 4, and ten years of supervised release as to Counts 1, 5, 6, and 7, all to run concurrently;

Oscar Cuni: life imprisonment, ten years of supervised release as to each count to run concurrently;

Jorge Lopez: 235 months of imprisonment as to Counts 1 and 3-6, to run concurrently, five years of supervised release as to those counts, sixty months of imprisonment as to Count 9 to run consecutively, and three years of supervised release as to that count;

Reynaldo Rodriguez: 292 months of imprisonment, five years of supervised release as to Count 1;

Mercedes Novaton: 235 months of imprisonment as to each of Counts 1 and 3-6, to run concurrently, five years of supervised release as to each count, to run concurrently;

Ramon Rosell: 235 months of imprisonment as to Counts 1, 3, and 5, to run concurrently, five years of supervised release as

to Counts 1 and 5, and four years of supervised release as to Count 3, to run concurrently;

Humberto Rodriguez: 262 months of imprisonment as to Counts 1 and 5, to run concurrently, five years of supervised release as to each count, to run concurrently;

Leopoldo Rodriguez: 235 months of imprisonment as to Counts 1, 3, and 7, to run concurrently, five years of supervised release as to Counts 1 and 7, and four years of supervised release as to Count 3, to run concurrently; and

Felipe Matamoros: 292 months of imprisonment as to Count 1, ten years of supervised release.

Each of the appellants filed a timely notice of appeal challenging his or her conviction and/or sentence.

II. DISCUSSION

A. CUNI'S MOTION TO SUPPRESS WIRETAP EVIDENCE

The first issue that we will discuss is whether certain evidence obtained from court-authorized wiretaps should have been suppressed by the trial court. Although several of the defendants filed motions to suppress in the district court, only Appellant Oscar Cuni presses this issue on appeal. He argues that the wiretap evidence should have been suppressed on Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978), grounds because the affidavits used to obtain court authorization for the wiretaps contained material misrepresentations and omissions.

The affidavits at issue were made by DEA Special Agent Lee Lucas in support of eight different applications for wiretaps, two of which were on cell phones possessed by Cuni. As grounds for probable cause, these affidavits explained that Francisco Novaton had been arrested for various drug-related offenses in the past, and that there was no record of his having been employed in the previous two years. The affidavits also stated that the video camera installed outside of the Novaton residence recorded vehicles coming and going frequently from the Novaton residence during the day and evening, and various individuals with past narcotics convictions, including Cuni, frequenting the residence.

Furthermore, Lucas' affidavits contained information purportedly received from four confidential sources which confirmed narcotics activity at the Novaton residence. The affidavits explained that court-authorized trap and trace and pen register equipment indicated that the Novatons made or received over 2,500 telephone calls in the preceding month, including numerous calls to Juan Ignacio Novaton, an individual with an extensive drug-related criminal history, and to Touchdown Realty, a business suspected of having narcotics connections.

Finally, the affidavits indicated that two Miami police officers, Lopez and Reynaldo Rodriguez, were suspected of facilitating the drug operation. The video camera recorded the frequent arrival and departure of police cars at the residence, and showed that police cars frequently drove past the house and slowed down. Also, the Novaton residence had received

telephone calls from a Miami Police Department telephone adjacent to Lopez's office.

After Cuni and several other defendants filed their motion to suppress on Franks grounds, a magistrate judge conducted an evidentiary hearing over the course of eleven days. Cuni and the others attacked the information provided by and about the confidential sources cited in the affidavits. In particular, Cuni pointed out that Agent Lucas failed to disclose that one of the three confidential sources who provided information about Cuni had been married to Cuni's wife, was extremely jealous of Cuni, and had engaged in stalking. Furthermore, Cuni argued that two of the informants were business rivals of his. Cuni also argued that Agent Lucas' affidavits were insufficient because they did not disclose adequate information about the informants' criminal histories, including the fact that one of the informants had been convicted of lying to the police. Finally, Cuni argued that Agent Lucas' affidavits misrepresented Cuni's criminal history as "extensive" and had erroneously attributed to him a prior cocaine conviction, when in fact that prior conviction involved heroin.

Following the hearing, the magistrate judge recommended that the motion to suppress be denied. She found that the information provided by the confidential sources was sufficiently corroborated by other evidence, and that any omissions concerning animus on the part of the informants, benefits provided to the informants, or the prior criminal record of the informants were immaterial. The magistrate judge noted that a reviewing magistrate is aware that

confidential informants "often are characterized by deal-making, [bad] motive and suffer from generally unsavory character," and that, even in the absence of allegations to that effect in an affidavit, courts take those factors into consideration in determining whether probable cause exists. Furthermore, the magistrate judge found that the description of Cuni's criminal history as "extensive" was not inaccurate and that the mischaracterization of Cuni's conviction as cocaine-related, when it was actually heroin-related, was immaterial. The district court adopted the magistrate judge's report and recommendation, agreed with each of her findings, and denied the motions to suppress.

Following his conviction, Cuni moved for a new trial and renewed his motion to suppress the wiretap evidence used against him. He reasserted the grounds contained in his pretrial suppression motion, and also argued that trial testimony and post-trial statements from certain of the informants cited in Agent Lucas' affidavits supported his motion. In particular, Cuni submitted affidavits from investigators and attorneys for Cuni and Novaton who stated that two of the informants had agreed to speak with them after the trial, and that those two informants denied having provided much of the information attributed to them in Agent Lucas' affidavits and stated that little if any of the information provided to the agents was based on their personal knowledge.

The magistrate judge conducted a three-day Franks hearing in response to the post-trial motion, after which she recommended denying Cuni's motion. The district court

adopted the magistrate judge's report and recommendation and denied the motion for a new trial.

On appeal, Cuni contends that the district court erred by not suppressing the wiretap evidence against him for four reasons. First, he argues that the affidavits contained material misrepresentations concerning the past cooperation and reliability of the informants. Agent Lucas' affidavits contained the following representation (almost identical in all of the affidavits):

[The law enforcement officers conducting the investigation] have received information from four (4) separate confidential sources (CSs) pertaining to a narcotics smuggling distribution organization . . . . In addition, the information provided by the CSs has proven reliable in the past. . . . CSs information has been corroborated by surveillance and police record checks.

Cuni asserts that this statement is false because three of the four informants had not cooperated with the police in the past. He argues that the misrepresentation must have been deliberate because the wiretap applications were filed between October 19, 1993 and December 1, 1993, while Agent Lucas testified that two of the informants only began providing information in September and October 1993.

Second, Cuni argues that the statement attributed to one of the informants was contradicted by that individual's testimony at trial. The affidavit stated that the informant had observed Cuni unloading boxes from a van at the Novaton residence under the supervision of a police officer. The informant retreated from that statement during his trial testimony.

Third, Agent Lucas' affidavit, dated November 16, 1993, supporting the application for a wiretap on one of Cuni's cell phones erroneously represented that Cuni had a prior conviction for cocaine trafficking, although the previous conviction actually related to heroin.

Finally, Agent Lucas' affidavits omitted facts concerning the criminal histories of the informants, including the fact that one of the informants had previously been convicted of lying to a police officer. Based on these alleged misrepresentations or omissions, Cuni argues that the district court erred by not suppressing the wiretap evidence.

We review the district court's findings of fact on a motion to suppress only for clear error, but review its application of law to those facts de novo. United States v. Jackson, 120 F.3d 1226, 1228 (11th Cir. 1997). In the present case, the district court's findings of fact were not clearly erroneous, and the court did not err in denying Cuni's motions to suppress.

In Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978), the Supreme Court set out the standards for considering an attack on the veracity of an affidavit filed in support of a search warrant. The Court stated that:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those

allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Franks, 438 U.S. at 171-72, 98 S. Ct. at 2684-85. "In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156, 98 S. Ct. at 2676.

Of the four alleged deficiencies with Agent Lucas' affidavits,

three involve affirmative misrepresentations and one involves omissions. In order to be entitled to relief, Cuni must carry his burden of proving (1) that the alleged misrepresentations or omissions were knowingly or recklessly made by Agent Lucas, and (2) that the result of excluding the alleged misrepresentations and including the alleged omissions would have been a lack of probable cause for issuance of the warrants. United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir. 1990). Cuni has failed to carry that burden.

The first alleged misrepresentation pointed to by Cuni relates to the statement in the affidavits to the effect that the four informants who provided information in support of probable cause had proven reliable in the past. Cuni asserts, and the government does not dispute in its briefs to us, that three of the four informants had never before cooperated with law enforcement officials. Cuni argues that this misrepresentation was inherently false and made with reckless disregard for the truth in light of Agent Lucas' subsequent testimony about when the informants began cooperating. The government responds that just because the informants had not cooperated in the past does not mean that the information they provided in connection with this case was unreliable. It also maintains that the misrepresentation was not material to the district court's finding of probable cause and that Cuni did not show that the representation was knowingly or deliberately included in the affidavit.

We find troubling Agent Lucas' apparent misrepresentations concerning the past cooperation of the informants involved in

this case. Although the government maintains that there was an absence of proof concerning the agent's deliberateness or recklessness in making the misrepresentations, it is unclear how Agent Lucas could have made such statements of an affirmative character for which there was no basis without having acted either deliberately or recklessly. Accordingly, we will assume that this was a deliberate or reckless misrepresentation.

However, Cuni's argument stumbles on the second-step of the Franks test. The Supreme Court made it clear in Franks that in order to be entitled to relief a defendant must show not only that misrepresentations or omissions were intentionally or recklessly made, but also that, absent those misrepresentations or omissions, probable cause would have been lacking. That is the test of materiality, and materiality is essential no matter how deliberate or reckless the misrepresentations were.

We do not believe that the statements concerning the past reliability of the informants, when viewed in the context of all the information contained in the affidavits, were material. Agent Lucas' affidavits contained extensive factual detail which was independent of the informants' statements and that supported probable cause. Although the magistrate judge did not directly address the alleged misrepresentations about past use of the informants, she did discuss whether there was sufficient corroboration of the informants' statements, and found there was. The district court agreed and adopted the magistrate judge's recommendation, and those findings of corroboration are not clearly erroneous. Under these

circumstances, even assuming Agent Lucas' statements concerning the informants' past reliability were deliberately false and subtracting those statements from the affidavits, there was still ample showing of probable cause in the affidavits.

Cuni's second argument, that the statement attributed to one of the informants was contradicted by that individual's testimony at trial, fares no better. The affidavit stated that the informant had observed Cuni unloading boxes from a van at the Novaton residence under the supervision of a police officer, but in his trial testimony, the informant retreated from that statement. However, the mere fact that an informant's trial testimony contradicts information attributed to that informant in an affidavit supporting a warrant does not entitle a defendant to suppression. Instead, the defendant must show that it is the agent, and not the informant, who has made misrepresentations. On this point, the magistrate judge heard testimony from another agent corroborating Agent Lucas' account of the information learned from the informants. Thereafter, the magistrate judge made factual findings, subsequently adopted by the district court, accepting the agents' version of their conversations with the informants. The court also found that "Cuni ha[d] failed to show that Agent Lucas either lied or recklessly presented false testimony in the wiretap affidavit." In light of the record and the superior opportunity of the magistrate judge to make credibility findings, we cannot say that these findings were clearly erroneous.

Next, we turn to the *Franks* challenge based on the erroneous statement by Agent Lucas in his affidavits that Cuni had a previous cocaine-related conviction, when in fact Cuni's prior conviction related to heroin. We agree with the district court that this error was completely immaterial to the finding of probable cause for the wiretaps. Cuni's argument to the contrary is frivolous.

Finally, Cuni argues that Agent Lucas should have included in his affidavits information concerning possible animus between the informants and Cuni as well as details about the informants' criminal histories, including the fact that one of the informants had previously been convicted of lying to a police officer. The magistrate judge and district court found these alleged omissions did not entitle Cuni to suppression. With respect to the failure to provide information concerning possible animus, the district court observed that "judges are accustomed to dealing with information derived from informants, and are well aware that such information is often obtained in the context of personal rancor and mixed motives." The court also noted that the agents had corroborated much of the information provided by the informants, thereby making the failure to inform the court of animus less material.

Similarly, the magistrate judge noted that the failure to perform more thorough reviews of the informants' criminal histories was a result of the fact that the investigation implicated Miami police officers, and, consequently, the agents involved were cautious not to call attention to the informants by digging into their criminal records. The

magistrate judge, therefore, found that the failure to discover and disclose aspects of the informants' criminal histories was not "an omission made with reckless disregard." The district court adopted this finding. We conclude that, under the facts of this case, the district court did not clearly err by finding that Cuni had failed to carry his burden of showing that the alleged omissions relating to the informants' criminal histories were either deliberate or reckless. Furthermore, in light of the other facts contained in the affidavits, the alleged omissions were immaterial to a finding of probable cause for the wiretaps. Therefore, Cuni's *Franks* challenge fails.

B. REYNALDO RODRIGUEZ'S MOTIONS TO SEVER

Reynaldo Rodriguez, a former Miami police officer, contends that the district court erred by denying his motion, made pursuant to Fed. R. Crim. P. 14, to sever his trial from that of his co-defendants. The ground urged in the motion was that separate trials were needed so that Rodriguez could obtain and utilize the testimony of co-defendants Francisco Novaton and Cuni. The district court referred the motion to a magistrate judge who recommended that it be denied without prejudice. Rodriguez filed objections to that report and recommendation and filed a renewed motion for severance. That renewed motion was supported by affidavits from Francisco Novaton and Cuni. After reviewing the Novaton and Cuni affidavits, the district court found that severance was not justified because the affidavits did not contain specific, exonerative facts and because the interest of judicial economy and preference for trying co-defendants together outweighed any

prejudice to Rodriguez. Rodriguez again moved for severance during the trial, and the district court again denied his motion.

Motions for severance are governed by Rule 14 of the Federal Rules of Criminal Procedure. That rule "requires a trial court to balance the rights of the defendants and the government to a trial that is free from the prejudice that may result from joint trials against the public's interest in efficient and economic administration of justice." *United States v. Pepe*, 747 F.2d 632, 649 (11th Cir. 1984). "Nevertheless, because of the well-settled principle that it is preferred that persons who are charged together should also be tried together, particularly in conspiracy cases, the denial of a motion for severance will be reversed only for an abuse of discretion." *United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir. 1999) (citation and quotation omitted). Furthermore, "[a]ppellate courts are reluctant to second-guess trial court refusals to grant a severance," and therefore, in order to show an abuse of discretion, a defendant must satisfy the "heavy burden" of demonstrating "compelling prejudice" from the denial of a motion to sever. *Pepe*, 747 F.2d at 650-51; *see also Cobb*, 185 F.3d at 1197 (noting that defendant must show "specific and compelling prejudice" in order to justify severance).

This Circuit's framework for analyzing a motion to sever is well-established. We have recognized that a defendant first must demonstrate:

(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed

have testified at a separate trial.

Cobb, 185 F.3d at 1197 (citations and quotations omitted). *See also United States v. DeSimone*, 660 F.2d 532, 539 (5th Cir. Unit B 1981) (same); *Byrd v. Wainwright*, 428 F.2d 1017, 1019-20 (5th Cir. 1970). If a defendant makes such a showing, then:

[A] court must still (1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion.

Cobb, 185 F.3d at 1197 (citations and quotations omitted). See also *DeSimone*, 660 F.2d at 540 (same). It is within this framework that we review whether the district court properly denied Rodriguez's motions for severance.

This Court's cases addressing severance motions have often looked hard at the substance of the affidavits proffered by the co-defendant who purportedly would testify in a separate trial. For example, in *Pepe*, the Court considered the effect of affidavits proffered by a co-defendant of *Albert "Chink" Facchione* in which the co-defendant stated that he could testify that *Facchione* had not conspired with him to carry out the act charged in the indictment and had not, to his knowledge, engaged in wrongdoing. *Pepe*, 747 F.2d at 650. After reviewing the proffered testimony, the Court concluded that:

[The testimony] consisted almost exclusively of bare

exculpatory denials, devoid of any specific exonerative facts. . . . [T]he testimony was of dubious credibility because it was in no way contrary to [the co-defendant's] own interests. Moreover, judicial economy weighed heavily against severance in this complex case. We thus conclude that *Facchione* failed to carry his "heavy burden" of showing "compelling prejudice" and that the district court did not abuse its discretion in refusing to sever his case.

Id. at 651 (emphasis added, footnote omitted). See also *DeSimone*, 660 F.2d at 540 (denying motion where affidavits contained no "specific and exonerative facts," but instead only self-serving, conclusory allegations). Therefore, statements concerning the testimony that would become available by severing trials must be specific and exonerative, rather than conclusory or self-serving, in order to justify severance.

This point is borne out in those cases in which we have found failure to sever to be an abuse. In *United States v. DiBernardo*, we held that a district court correctly granted a motion to sever where a co-defendant proffered an affidavit stating he would testify that he had acted alone with regard to much of the charged criminal activity, and that the defendants who were seeking severance had no knowledge of his actions. 880 F.2d 1216, 1228 (11th Cir. 1989). We noted that such evidence incriminated the affiant and was significant to the defense because it would have specifically rebutted a crucial element of the prosecution's case. *Id.; see also Cobb*, 185 F.3d at 1198-99 (finding an abuse of discretion where a co-defendant would have testified that he had not shared the proceeds of a

bank robbery with the defendant, and where only evidence against defendant was testimony by a witness who allegedly saw defendant receive share of proceeds).

Our review of the affidavits submitted in support of Rodriguez's motion convince us that they do not contain the type of specific and exonerative facts which would establish that the district court abused its discretion in denying the motions. Almost all of the statements contained in the affidavits by Novaton and Cuni consist of conclusory denials of the charges in the indictment. For example, one such statement reads that Novaton would testify "[t]hat REYNALDO RODRIGUEZ did not conspire with me, or to my knowledge with anyone else, to possess with intent to distribute cocaine at any time in 1993, as alleged in Count One of the Superseding Indictment in this case." This is precisely the type of self-serving statement which we have found to be insufficient to show "compelling prejudice" requiring a new trial.

Other than conclusory statements, which are neither contrary to the affiants' penal interests nor contain any other indicia of credibility, the only factual statement contained in either affidavit is one statement by Novaton attempting to explain the frequency of Rodriguez's visits to the Novaton residence. Novaton's affidavit says "[t]hat on the occasions when REYNALDO RODRIGUEZ visited my residence . . . in 1993, he did so to eat, use the bathroom facilities, engage in Santeria worship, and for other personal reasons. He did not engage in any illegal narcotics activity in my residence at any time." This

lone statement in no way incriminates the affiant, and it does not present the type of "specific and exonerative" facts necessary to require a severance. We hold that the district court did not abuse its discretion by denying Rodriguez's motions for severance, particularly in light of the substantial systemic interest in handling this complex, conspiracy case in one trial (which lasted two months).

C. REYNALDO RODRIGUEZ'S RULE 806 MOTION TO ADMIT CO-DEFENDANTS' AFFIDAVITS IN ORDER TO IMPEACH CO-CONSPIRATOR HEARSAY STATEMENTS

Reynaldo Rodriguez also contends that the district court erred by not permitting him to introduce the Novaton and Cuni affidavits submitted in support of his motions for severance as evidence at trial in order to impeach co-conspirator hearsay statements by them which were admitted. Rodriguez argues that the affidavits were admissible under Fed. R. Evid. 806, which provides that:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) [which includes co-conspirator statements], has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified at trial as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is

not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Fed. R. Evid. 806 (bracketed material added).

The government responds that the affidavits were not admissible under Rule 806 because they were not inconsistent with any of the co-conspirator statements admitted at trial. Although acknowledging that numerous co-conspirator statements were admitted, mostly in the form of taped conversations from the wiretaps, the government argues that those statements were not admissions of Rodriguez's complicity in the co-conspirators' crimes, but instead were statements that were part of the commission of the conspiracy and other underlying crimes. Because, it contends, no inconsistent statements were admitted, there was nothing to be impeached by the affidavits.

After the parties presented oral arguments in this case, we requested that Rodriguez provide the Court with supplemental briefing on the Rule 806 issue providing us with record cites to the co-conspirator statements admitted at trial which, in his view, would have been impeached by the Novaton and Cuni affidavits that he sought to have admitted. While attempting to respond to our request, Rodriguez discovered that although approximately 100 tape recordings (primarily of conversations intercepted by wiretaps) and accompanying transcripts and translations had been introduced as exhibits at trial, none of

those exhibits were included in the record on appeal.

After we were informed by Rodriguez that the record on appeal was incomplete, we ordered the parties to discuss the missing portions of the record, and to tell us about the status of the record. In response, we were informed by Rodriguez that neither the district court clerk's office, nor our clerk's office, knew where the missing trial exhibits were. Rodriguez further indicated that the United States Attorney's Office was unaware of the location of the tapes and transcripts, and did not have duplicates of those trial exhibits, although the DEA apparently had at least some duplicate tapes, but no transcripts.

Although Rodriguez's counsel attempted to reconstruct some of the missing transcripts based on records he had, the Assistant United States Attorneys working on this appeal were initially unable or unwilling to stipulate to the authenticity of those transcripts because they had not been involved in the trial of the case. All of the prosecutors who participated in the trial have left the United States Attorney's Office. After being informed of this situation, our clerk's office inquired of the district court clerk's office concerning the trial exhibits, and was informed that the voluminous trial exhibits had been returned to the United States Attorney's Office at some time after the conclusion of trial, and that the district court clerk's office had not maintained copies of the exhibits nor had it included any of the exhibits in the record on appeal.

We urged the parties to do more to solve the problem of the missing exhibits. Later, we were informed that the United States Attorney's Office had located some tapes from which

the missing transcripts might be reconstructed. Hoping to avoid the necessity of an evidentiary hearing, which would obviously require a remand, we directed counsel for Reynaldo Rodriguez and the government to meet and attempt to reach a stipulation about the contents of the missing exhibits. They made some progress but were not entirely successful. Some reconstructed transcripts have now been submitted to us, and the counsel for Rodriguez and the government have stipulated that those transcripts are true and correct copies of some of the missing trial exhibits. Rodriguez insists, however, that not all of the transcripts have been reconstructed and submitted to us, and apparently contends that some of the missing ones are or may be relevant to his Rule 806 issue. Absent any basis for concluding to the contrary, we will assume for present purposes that is true.

It is against this background that we are asked to decide whether it was an abuse of discretion for the district court not to admit into evidence the two affidavits that Reynaldo Rodriguez wanted to use to impeach co-conspirator statements contained in transcripts of conversations that were admitted into evidence. In a recent case, we recognized that under some circumstances a district court's failure to admit affidavit statements which would impeach co-conspirator statements admitted at trial is reversible error. See *United States v. Grant*, 256 F.3d 1146, 1152-1156 (11th Cir. 2001). We held that under Rule 806, "[t]he test is whether the out-of-court statements would have been admissible for impeachment purposes had the co-conspirator statements been delivered from the witness stand by the co-conspirator himself, not as

hearsay about what he said during the conspiracy but as contemporaneous in-court statements." Id. at 1154. We are loath to decide this issue without assurance that every effort, including an inquiry by the district court, has been made to reconstruct all the missing trial exhibits that are relevant to the issue.

Rule 10 of the Federal Rules of Appellate Procedure places the burden on appellants to ensure that the record on appeal is properly prepared and forwarded to the court of appeals. However, in this case it appears that the problems with the record are not due to any lack of diligence or care on the part of Rodriguez. He made a timely request to the district court clerk's office that the entire record be included in the record on appeal. Through no fault of his own, that was not done, and the relevant trial exhibits were instead returned to the government. Also, through no fault of Rodriguez, the government subsequently misplaced those exhibits. Under these circumstances, we will not hold Rodriguez accountable for the deficiencies in the record.

We previously have considered what to do when an incomplete record on appeal is supplied to us, and have stated that "[i]f the defendant is represented by the same attorney at trial and on appeal, a new trial may be granted only if the defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal."[13] *United States v. Medina*, 90 F.3d 459, 462-63 (11th Cir. 1996). A criminal defendant's entitlement to a new trial based on the incompleteness of the

record, however, is "premised upon the district court's inability to reconstruct the record." *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992). A reconstructed record, even if not identical to the original trial transcript and exhibits, will provide a defendant with sufficient due process as long as it "can accord effective appellate review" of the issues raised on appeal by the defendant. Id. at 703.

In this case, the district court should make findings about whether there are in fact any missing trial exhibits that are relevant to Reynaldo Rodriguez's Rule 806 issue. If it finds that there are, the district court may be able to reconstruct, as provided in Rule 10(e) of the Federal Rules of Appellate Procedure, any missing trial exhibits that are relevant to the Rule 806 issue, which Rodriguez and the government have not been able to supply through stipulation. The court should at least attempt to do so. Therefore, we will remand this part of the case involving Reynaldo Rodriguez to the district court in order for it to make findings about whether there are any missing trial exhibits that are relevant to the Rule 806 issue, and for it to attempt to reconstruct any that are relevant. See *United States v. Taylor*, 607 F.2d 153, 154 (5th Cir. 1979) (remanding for reconstruction of trial transcript); *United States v. Preciado-Cordobas*, 923 F.2d 159, 160-61 (11th Cir. 1991) (remanding for reconstruction of closing arguments).

On remand, the district court may consider whatever evidence or testimony it sees fit for these purposes. *Preciado-Cordobas*, 923 F.2d at 160-61. Because the only issues remaining relate to Reynaldo Rodriguez's Rule 806 argument, the district court

need only concern itself with the portions of any missing trial exhibits that contain co-conspirator statements by Cuni and Francisco Novaton which Rodriguez contends were impeached by their proffered affidavits.

Although remanding this case for findings and for a reconstruction of any relevant missing trial exhibits has the unfortunate effect of prolonging this already protracted litigation, we see no alternative which will provide Rodriguez with the due process protection to which he is entitled. Remanding the case will also give the district court an opportunity to reconsider its ruling on the Rule 806 issue in light of our *Grant* decision, which it did not have at the time of trial. We imply no view on whether *Grant* controls this case, but if the district court after reconstructing the missing transcripts and reconsidering the issue in light of *Grant* does decide that Rodriguez is entitled to a new trial, it should grant one.

On the other hand, if the district court finds that there are missing trial exhibits, which it cannot reconstruct, that are relevant to Reynaldo Rodriguez's Rule 806 issue, that court should decide in the first instance whether the missing exhibits prejudice Rodriguez by denying him effective appellate review within the meaning of our *Medina* and *Cashwell* decisions. Whatever the district court decides about either or both issues, the losing party may appeal. In light of that possibility, specific factfindings by the district court will be appreciated by this Court.

D. ROSELL'S ABSENCE FROM TRIAL

Next, we turn to Appellant Ramon Rosell's contention that the district court erred by going forward with his trial even though he was absent due to health problems. Rosell argues that the court should have either granted a continuance, severed him from the trial, or granted a mistrial in light of his absence. His position is that the court's failure to do so resulted in the violation of his rights under the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and Rule 43 of the Federal Rules of Criminal Procedure. We agree.

The eight-week-long trial in this case started on September 28, 1994. Rosell was in attendance at the trial from that time up until November 10, 1994. During a break in the late afternoon of that day, Rosell became ill and collapsed in the corridor of the courthouse. Emergency services were called, and Rosell was taken to the hospital by ambulance. After the district court was informed about these events, the court stated that it did not want to continue with trial if Rosell was unavailable and wished to attend. Because the evidence being presented by the prosecution at that time had nothing to do with Rosell's part of the case, however, his counsel agreed to go forward and waived Rosell's right to be present.

On November 14, the next day of trial, Rosell's counsel informed the court that Rosell initially had been hospitalized, but that he had been released an hour before the trial reconvened that day. Again because the evidence was unrelated to Rosell, his counsel waived Rosell's right to be present and requested permission to allow Rosell to stay home.

The court agreed.

The next day, Rosell's counsel reported to the court that Rosell was physically unable to participate in the trial, and provided a letter to the court from Rosell's doctor concerning his condition. Rosell's counsel also consented to the government's discussing Rosell's condition with his doctor. For the first time, Rosell's counsel indicated to the court that a continuance might be necessary as portions of the trial relevant to Rosell's part of the case were about to begin. Counsel indicated that he was willing to cooperate and allow the trial to go forward with respect to matters unrelated to Rosell, but reiterated that Rosell did not waive his right to be present for aspects of the trial germane to him.

The following morning, Rosell was still absent from the trial. The government reported that it had spoken with Rosell's doctor, and that the doctor did not have enough information to know whether Rosell could attend the trial. The doctor indicated that an X-ray would be necessary in order to determine Rosell's condition. Rosell's counsel informed the court that he had difficulties communicating with his client because of the pain which Rosell was suffering and because of his medication. Rosell's counsel moved for continuance at that point in time so that an X-ray could be taken in order to determine the severity of Rosell's condition. The district court denied the motion for continuance finding that, based on the information that it had at that time, Rosell's absence was voluntary. The court did say that Rosell could present evidence to show the contrary.

The district court also denied Rosell a two-hour continuance so that his doctor could be brought into court and questioned about Rosell's condition. The court indicated that Rosell's counsel could skip the examination of the next witness if he needed to try to get more information about his client's condition. Counsel resisted that option, however, because he had been told that information relevant to Rosell would be brought out during the cross-examination of that witness. Rosell's counsel then requested a continuance of an hour and twenty minutes so that he could go to his client's home, and attempt to bring him to the courthouse so the judge could see his condition. The court denied that request. Rosell then made a motion for a mistrial, which the district court denied.

Later that afternoon, Rosell attended the trial for approximately an hour and twenty minutes. His counsel informed the court that he and Rosell's brother had to carry Rosell into court. Counsel informed the court that Rosell felt dizzy and uncomfortable as a result of the pain he suffered and the pain killers and other medications which he was taking, and that Rosell was sleeping fourteen to sixteen hours per day. Rosell's counsel also informed the court that he had been unable to have meaningful conversations with Rosell concerning the case since the day on which Rosell collapsed and was carried away by ambulance. Rosell's counsel also proffered Rosell for any questions that the judge might have concerning his condition, but the court indicated that it had no questions. Rosell confirmed under oath his counsel's representations concerning his condition and his inability to have meaningful

conversations with his attorney about the case. After this presentation, Rosell's counsel informed the court that Rosell had another doctor's appointment later that afternoon, and requested a continuance until the following morning. Alternatively, he moved for a mistrial. The district court denied both motions.

On Thursday, November 17, Rosell's attorney informed the court that Rosell had been admitted to the hospital the previous evening, and that it was his understanding Rosell would be hospitalized for two or three days. The court noted that the situation was problematic, but determined that the trial should go forward given that it was the last day of evidence in an eight-week trial. The court noted that this decision might ultimately require that a mistrial be declared. The court nonetheless denied Rosell's motion for a continuance.

Later in the day, Rosell's counsel was forced to go forward with his defense case despite his client's absence from the trial. As part of his case, Rosell's attorney called and examined several witnesses, including the government agents who had monitored the wiretaps. Rosell remained hospitalized and absent from trial that day and on the following day when his counsel closed his defense case and when closing arguments began. Again, the district court denied his counsel's motions for a continuance or a new trial.

On the following Monday, two days after the conclusion of Rosell's defense, and after closing arguments had begun, Rosell returned to court. Thereafter, the jury convicted him of all three counts with which he was charged. Rosell made a

post-trial motion for a new trial based, in part, on the district court's denial of his repeated motions for a continuance or mistrial as a result of his absence. The district court denied that motion. In doing so, the court stated that even assuming Rosell's absence was involuntary, he was not entitled to a new trial because his counsel had been present at trial and there had been no showing of prejudice resulting from Rosell's absence.

1. Standard of Review

We review for clear error a district court's determination of whether a defendant's absence from trial was voluntary or involuntary. *United States v. Bradford*, 237 F.3d 1306, 1311 (11th Cir. 2001). "If the court properly found the right [to be present] waived, we consider whether the court abused its discretion in concluding that there was on balance a controlling public interest to continue the trial in the defendant's absence." Id. "Finally, if the court erred in continuing trial in the defendant's absence, we ask whether the error was harmless." Id. "The determination of whether a constitutional error is harmless presents a mixed question of fact and law. . . . In reviewing mixed questions of fact and law the court is free to substitute its own judgment for that of the district court." Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986).

2. Voluntariness of Rosell's Absence

The first question which we must address in order to decide whether Rosell is entitled to a new trial because of his absence on three full days (November 15, 17, and 18) and most of a fourth day (November 16), is whether his absence was

voluntary or involuntary.[4] *Bradford*, 237 F.3d at 1311. The parties have conflicting views on whether the district court ever answered this question. The government points out that the district court made a finding on November 16 that, based on the evidence that had been presented, it would treat Rosell's absence as voluntary. Rosell points out that the district court assumed for purposes of his motion for new trial that the absence was involuntary.

The district court never explicitly revisited its November 16 finding that Rosell was voluntarily absent, but the court made that finding before it was provided with much information about Rosell's condition. It also made that finding before Rosell's second hospitalization, which occurred during his absence from the two days of trial while his defense was presented. It is not clear from the record that the district court found Rosell's entire absence voluntary. For example, in discussing whether to go forward without Rosell on November 17, the day that the presentation of Rosell's defense began, the district court acknowledged that a showing that Rosell was "simply unable to attend" might be possible and could result in a mistrial. At that time, the court made no mention of Rosell's absence being voluntary. Given that, we do not agree with the government that the district court found the entirety of Rosell's absence to be voluntary.

In light of the record, we are convinced that at least substantial portions of Rosell's absence were involuntary, and that any contrary finding by the district court would have been clearly erroneous. Whether Rosell was voluntarily absent during the

time when he was at home, but in pain and highly medicated, is a difficult issue, and if those were the circumstances surrounding the entirety of Rosell's absence, then it might be difficult for us to conclude that the district court clearly erred in finding the absence voluntary - if that is what the court did or would do. However, at least during the periods of time when Rosell was hospitalized, which included both days on which his defense was presented, we find that Rosell was involuntarily absent from court, and that any contrary finding would be clearly erroneous.

The record makes it abundantly clear, and the government does not dispute, that Rosell's ailments during the last week of his trial were real. There is no contention that this is a case in which a defendant was faking an illness or otherwise attempting to scuttle a trial. Rosell attended seven weeks of this eight-week trial, and was absent only after collapsing in the courthouse and being carried away in an ambulance. He was hospitalized twice over a ten-day period. Even after Rosell became ill, his counsel cooperated commendably with the government and the district court and only moved for a continuance, or in the alternative a mistrial, after the evidence being presented began to directly impact Rosell's part of the case. Under these circumstances, and absent further evidence, which neither side has requested an opportunity to present, it would be clearly erroneous to find that Rosell's absence was not, at least in part, involuntary.[5]

3. Prejudice to Rosell

We now turn to whether the district court erred by not granting

a continuance or a mistrial in light of Rosell's involuntary absence. The right of a criminal defendant to be present at trial has three bases: the Confrontation Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and Fed. R. Crim. P. 43. See *United States v. Brantley*, 68 F.3d 1283, 1290-91 (11th Cir. 1995) ("The right to be present during one's trial arises from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment, and is codified at Rule 43 of the Federal Rules of Criminal Procedure.").

The right to be present pursuant to the Confrontation Clause has been referred to as a "trial right," and is less broad than the right afforded by the Due Process Clause or Rule 43. *United States v. Boyd*, 131 F.3d 951, 954 (11th Cir. 1997). The Supreme Court has "emphasized that a primary interest secured by the Confrontation Clause is the right of cross-examination." *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 2662 (1987) (citation, quotation, and brackets omitted). Thus, this clause has the "functional purpose [of] ensuring a defendant an opportunity for cross-examination." Id. at 739, 107 S. Ct. at 2664.

The Due Process Clause, on the other hand, offers a criminal defendant a somewhat broader right to be present. See *Boyd*, 131 F.3d at 954. The Supreme Court described this right as follows:

The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his

own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." . . . Although the Court has emphasized that this privilege of presence is not guaranteed "when presence would be useless, or the benefit but a shadow," . . . due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence" . . . . Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Stincer, 482 U.S. at 745, 107 S. Ct. at 2667 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-08, 54 S. Ct. 330, 332-33 (1934)). Similarly, this Court has stated that "[t]he right of a criminal defendant to be present at all critical stages of his trial is a fundamental constitutional right." *Proffitt v. Wainwright*, 685 F.2d 1227, 1260 n.49 (11th Cir. 1982).

On its face, Rule 43 seems to provide a right to be present at trial that is broader still. Subject to certain inapplicable exceptions (including voluntary absence), the rule mandates that "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." Fed. R. Crim. P. 43(a). Although we have noted that "Congress' intent in enacting Rule 43 was to codify then-existing case law regarding a criminal defendant's right to be present," we have declined to determine the extent to which the rule and the constitutional sources of the right to

be present overlap. *Boyd*, 131 F.3d at 953 n.3.

It is clear under the facts of this case that the full force of each of the three sources of the right to be present - the Confrontation Clause, the Due Process Clause, and Rule 43 - bears down on the district court's decision to continue the trial in Rosell's absence. The "trial right" aimed at ensuring effective examination of witnesses provided by the Confrontation Clause is implicated given that Rosell was absent during several days of trial while witnesses gave testimony against him. The Due Process Clause's guarantee of presence during all "critical stages" of a trial applies because Rosell was absent during both the government's case-in-chief relating to him as well as the presentation of his own defense case. Stages of a trial could hardly be more critical for a defendant. Finally, the portions of the trial Rosell missed were unquestionably "stages" subject to Rule 43's directive. Consequently, Rosell had a clear right to be present during the portions of the trial which were conducted over his protest in his absence, and the district court committed a constitutional and statutory error by denying him that right.

The existence of error does not end our inquiry, however, because courts have repeatedly held that the continuation of trial in absence of a defendant may be harmless. See, e.g., *Finney v. Zant*, 709 F.2d 643, 646 (11th Cir. 1983) ("Any error by reason of Finney's absence during trial was harmless beyond a reasonable doubt."), overruled on other grounds, *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986); *Hall v. Wainwright*, 805 F.2d 945, 947-48 (11th Cir. 1986) (same);

Proffitt, 685 F.2d at 1260 n.49 ("[O]nce the defendant has established a violation of that right [to be present] his conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt.").[6]

Under the circumstances of this case, the government has not carried its burden of proving that the unconstitutional continuation of trial in Rosell's absence was harmless beyond a reasonable doubt. In reaching the conclusion that the error was not harmless, we find important the particular parts of his trial that Rosell missed. Obviously, the more crucial the stage of trial, the less likely that a defendant's involuntary absence was harmless. On several occasions, this Court has found that a defendant's absence was harmless. See, e.g., *United States v. Boyd*, 131 F.3d 951, 953-54 (11th Cir. 1997) (finding harmless the defendant's absence during evidentiary hearing on motion for new trial); *United States v. Brantley*, 68 F.3d 1283, 1290-91 (11th Cir. 1995) (finding harmless defendant's unobjected-to absence during time when jury challenges were exercised); *United States v. Harris*, 908 F.2d 728, 739 (11th Cir. 1990) (finding harmless a defendant's short absence during closing argument where defendant had attorney present and did not object to proceeding); *Hall v. Wainwright*, 805 F.2d 945, 947-48 (11th Cir. 1986) (finding harmless defendant's absence during non-substantive portion of jury qualification and during brief colloquy between judge and jury during deliberations); *United States v. Pepe*, 747 F.2d 632, 652-54 (11th Cir. 1984) (finding harmless defendant's absence during portion of James hearing on admissibility of

co-conspirator hearsay evidence); *Finney v. Zant*, 709 F.2d 643, 645-46 (11th Cir. 1983) (finding harmless defendant's brief, voluntary absence during the examination of witnesses when the defendant went to the restroom).

None of those decisions, however, involved the absence of a defendant for the length of time involved in this case or during stages of a trial as critical as those missed by Rosell.[7] Unlike the previous cases in which we found a defendant's absence to be harmless, Rosell was denied the opportunity to assist his attorney in the cross-examination of several witnesses put on by the government and by some co-defendants. Rosell was unable to confront those witnesses in the courtroom and unable to observe the witnesses put on in his own defense or to suggest additional areas of inquiry his attorney might pursue with any of the witnesses who testified during his involuntary absence. He was also not present to discuss with his attorney whether additional witnesses should have been called. Under these circumstances, we cannot say that the government has carried its burden of proving that proceeding with the trial during Rosell's involuntary absence was harmless beyond a reasonable doubt.

Two arguments put forward by the government on this issue do merit some discussion. One is its argument that Rosell suffered no prejudice from his absence because his attorney was present at trial and represented his interests. As a panel of our predecessor court previously noted, "in many cases finding a defendant's involuntary absence at trial to have been harmless error, the court emphasizes the fact that while the

defendant may have been absent, his attorney was present to protect his rights." *United States v. Stratton*, 649 F.2d 1066, 1080 (5th Cir. 1981). Although the presence of counsel is certainly a relevant factor to be considered in determining whether a defendant's absence was harmless, the right to be present at trial - grounded in the Confrontation Clause and the Due Process Clause - is not a gossamer right inevitably swept away simply because a defendant is represented, in his absence, by counsel. The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel. Furthermore, such a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.

Second, the government argues that Rosell has made an insufficient showing of prejudice, because he "does not point to any issue that his counsel did not raise relevant to his defense." This argument, like the one we have just discussed, devalues the constitutional right to be present, and ignores the assistance that a defendant can provide to his counsel during trial. If we were to require that a defendant show with specificity how his presence might have changed the course or outcome of a trial, then the right to be present would cease to exist in many cases in which the evidence of guilt is strong. The right to be present at one's own trial is not that weak. And, of course, the government's argument would transfer the burden on the prejudice issue from it to the defendant. For these reasons, Rosell's rights under the Confrontation Clause, the Due Process Clause, and Rule 43 were violated by

continuation of the trial over his protests while he was involuntarily absent during critical stages of the trial, and the government has not proven that the violations were harmless beyond a reasonable doubt. Accordingly, we remand for a new trial.

E. THE BATSON CHALLENGE

Mercedes Novaton, Rosell, Jorge Lopez, Matamoros, Cuni, Reynaldo Rodriguez, and Leopoldo Rodriguez argue that the government violated the Equal Protection Clause by using its peremptory challenges in a racially discriminatory manner. See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). During jury selection, the government used six of its eight peremptory challenges to strike Hispanic jurors (the government did not exercise its other two challenges).[8] At the time that the government exercised its peremptory challenges, most or all of the appellants objected on *Batson* grounds. They argued to the district court that the government was striking Hispanic jurors because the appellants were of Hispanic descent. The district court rejected the appellants' *Batson* challenges, concluding that the appellants had not made a prima facie showing given that several Hispanic jurors were accepted by the government and that the appellants themselves had exercised peremptory challenges against Hispanic jurors. Nonetheless, the court permitted the government to offer a race-neutral explanation for each of its peremptory strikes if it chose to do so, and the government took the court up on its offer.

The government proffered race-neutral explanations for each

of the six peremptory challenges it exercised. With respect to the first juror that the government struck, Ms. Jarp, the government had attempted to have her removed for cause because of her difficulty understanding English. When asked by the court whether she understood what was being said, Ms. Jarp had responded: "Like I said, for me it is a little hard because I don't speak the language very well as everybody else," although she stated that she did not think that she had problems understanding the proceedings. The court declined to strike her for cause, and the government exercised its peremptory challenge. To explain its peremptory challenge of a second juror, Ms. Mason, the government stated that the juror had indicated that her son had been wrongfully arrested for possession of cocaine.

Next, the government struck Ms. Orsatelliz. The stated reason was that she was a social worker employed by Health and Rehabilitative Services. The government's fourth peremptory challenge was used against Ms. Michelsen. There was confusion among the attorneys as to whether Ms. Michelsen was Hispanic. The government stated that it had no knowledge of her being Hispanic, but certain defense attorneys stated that she was. The government said that although it did not know whether Ms. Michelsen was Hispanic, it would provide its race-neutral explanation, which is that Ms. Michelsen had previously accompanied a criminal defendant to his sentencing in order to hold his hand and give moral support.

The government's fifth peremptory strike was used against Ms. De La Roca. When challenged, the government explained

that it struck Ms. De La Roca because she was friends with one of the defense attorneys, knew another defense attorney, and had previously worked for a judge who was prosecuted by federal authorities. The defense attorney with whom Ms. De La Roca claimed to be friends stated that although he knew her, he did not consider her a friend. Finally, the government struck Mr. Saenz. The government explained that "[t]he basis for the Government's striking of Mr. Saenz [was] his age, lack of life experience, and the fact that when asked . . . [about] the influence of narcotics indicated he had friends who 'smoked weed.'" Satisfied with the government's race-neutral explanations for all of its peremptory challenges, the district court denied the appellants' Batson motion.

1. Standard of Review

"A district court's findings regarding whether a peremptory strike was exercised for a discriminatory reason largely involve credibility determinations and are therefore entitled to great deference. Thus, we review a district court's findings in this respect only for clear error." *United States v. Tokars*, 95 F.3d 1520, 1530 (11th Cir. 1996) (citation omitted).

2. The Batson Framework

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), the Supreme Court recognized that a prosecutor violates a defendant's equal protection rights when he or she uses peremptory challenges in a racially discriminatory manner in order to strike from the petit jury members of the defendant's race. Courts evaluate Batson objections under the following three-step procedure:

(1) the objector must make a prima facie showing that the peremptory challenge is exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination.

United States v. Allen-Brown, 243 F.3d 1293, 1297 (11th Cir. 2001).

Our cases hold that "the establishment of a prima facie case is an absolute precondition to further inquiry into the motivation behind the challenged strike." *Central Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 636 (11th Cir. 2000). "[T]he party objecting to a peremptory strike bears the burden of establishing facts sufficient to support an inference of racial discrimination." Id. However, "the trial court should consider all relevant circumstances" in determining whether a prima facie case of discrimination has been established. *Batson*, 476 U.S. at 96-97, 106 S. Ct. at 1723. Such circumstances include whether there is a "pattern" of strikes against jurors of a certain race, and the questions asked by the prosecutor during voir dire. Id. at 97, 106 S. Ct. at 1723.

This Court has cautioned, however, that "the mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination." *Lowder Realty*, 236 F.3d at 636. Instead, "[t]he number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who

were struck compared to the answers of those who were not struck." Id. at 636-37. The existence of a "substantial disparity between the percentage of jurors of one race struck and the percentage of their representation on the jury" may create such an inference of discrimination, whereas "the unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a prima facie case of discrimination in the peremptory striking of jurors of that race." Id. at 6338. "Courts reviewing the resolution of a *Batson* challenge give great deference to a district court's finding as to the existence of a prima facie case." *Allen-Brown*, 243 F.3d at 1296 (citations and quotations omitted).

If a *prima facie* case of discrimination is established, then the prosecution must proffer a race-neutral explanation for its strikes. The Supreme Court has stated that "[t]he second step does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 1771 (1995). In explaining the language in Batson, the Court noted that "[w]hat [Batson] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." Id. at 769, 115 S. Ct. at 1771. See also *United States v. Cobb*, 185 F.3d 1193, 1196 n.2 (11th Cir. 1999) ("Under *Batson*, the reason for a peremptory strike that is challenged on race grounds does not have to be 'valid' in any sense other than race-neutral, nor does it have to relate to the case being tried.").

After a race-neutral explanation is offered, a court must then determine whether an equal protection violation has occurred.

It is during the "third step [of the *Batson* framework] that the persuasiveness of the justification [proffered by the prosecutor] becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." Purkett, 514 U.S. at 768, 115 S. Ct. at 1771.

3. Application to This Case

It is somewhat unclear on this record whether the district court rejected the appellants' *Batson* objections based on their failure to establish a prima facie case, or whether it did so because, in light of all relevant circumstances including the government's race-neutral explanations for its strikes, it found that the appellants had not carried their burden of proving that the challenged strikes were purposely discriminatory. When the appellants first raised the *Batson* issue, after the prosecution had exercised its first two strikes against Hispanic jurors, the court indicated that they had not established a prima facie ease requiring a race-neutral explanation. Nonetheless, it allowed the government to proffer such an explanation, and the court indicated that it accepted the government's explanation. The court again indicated after the third strike that it did not believe that the government was obligated to offer an explanation. However, after the appellants made their later Batson objections, the court no longer voiced any opinions about whether or not a prima facie case of discrimination had been established or whether the government was obligated to proffer its race-neutral explanations. Instead, the court listened to those explanations, as well as the arguments made by the

appellants' attorneys, and then overruled the objections.

We do not believe that the judge abused his discretion by finding that the first two or three strikes by the government did not require a response from the government. However, in light of the fact that the judge decided to hear the prosecution's explanations before ruling on the final *Batson* objections, and given that the court eventually stopped indicating that the government was not obligated to proffer those explanations, we will assume for purposes of this opinion that the district court found that the appellants had put forth a prima facie showing of discrimination when all of the government's peremptory strikes were considered together. It is only an assumption, because whether the court actually did so is far from clear. We will further assume that the assumed finding of a prima facie case was correct.

Even assuming all of this, the appellants are not entitled to relief because the district court did not commit clear error by denying the appellants' *Batson* objections in light of the government's proffered, race-neutral explanations for its peremptory strikes as well as the other relevant circumstances. The appellants' contention that the government's explanations were pretextual concern only two of the strikes - those against Ms. De La Roca and Ms. Orsatelliz. The appellants point out that although the government said that it struck Ms. De La Roca because she was friends with one of the defense attorneys and had worked for a judge who had been federally prosecuted, another non-Hispanic juror who was not dismissed had worked as a clerk in the state criminal courts and stated

that he knew "most of the people here." Furthermore, the appellants argue that even though Ms. Orsatelliz was dismissed because she was a social worker employed by the Health and Rehabilitative Services, and was therefore presumably "liberal," three other jurors who worked for the Dade County Department of Education had not been struck even though their employment could also indicate that they were liberal.

These arguments do not persuade us that the district court committed clear error in finding that the prosecution's strikes were non-discriminatory. We have recognized that "failing to strike a white juror who shares some traits with a struck [non-white juror] does not itself automatically prove the existence of discrimination." *United States v. Stewart*, 65 F.3d 918, 926 (11th Cir. 1995). That is certainly true where there are relevant differences between the struck jurors and the comparator jurors. Here there are such differences. Although a white juror who worked for the courts and knew the attorneys was not struck, the Hispanic juror with those traits who was struck also had the added problem, from the government's perspective, of having worked for a judge who had been prosecuted by the federal government. That additional aspect of the Hispanic juror's background could certainly lead a prosecutor to decide to exercise a peremptory strike against her, but not the other juror.

Similarly, the fact that three Department of Education employees were allowed to remain on the jury certainly does not indicate that the government lied when it said that the

reason it struck another juror was that she was a social worker for another agency. The appellants have not shown that all reasonable prosecutors would have considered those positions equally "liberal."

Moreover, we note that the district court was free to consider all other relevant circumstances, such as the fact that the government left several Hispanic jurors unchallenged and that the appellants themselves exercised peremptory challenges to strike Hispanic jurors, in deciding whether the appellants had carried their burden of proving that the government had committed an equal protection violation. On this record, we conclude that the district court did not clearly err in reaching the conclusion that the government had not exercised its strikes in a manner that discriminated against Hispanics.

F. THE FAILURE TO PERMIT CROSS-EXAMINATION OF AGENTS CONCERNING UNRELATED INVESTIGATIONS

Appellants Reynaldo Rodriguez, Humberto Rodriguez, Mercedes Novaton, Leopoldo Rodriguez, Rosell, and Lopez contend that the district court committed reversible error by granting the government's motions in limine precluding them from cross-examining some of the agents about certain matters. Although the motions concerned four different agents, the appellants' arguments on appeal are limited to the preclusion of cross-examination of two of them - Detective Paez and Agent Lucas. First, the appellants maintain that they should have been permitted to cross-examine Paez about his involvement in the "Miami River Cops Scandal." As a part of

the investigation into that scandal, Paez had been suspended with pay from the police force for a four-month period in 1987. After the investigation, he was reinstated. No criminal charges were ever brought against Paez in connection with the scandal, although he was formally reprimanded for failing to document a conversation with an informant.

The appellants argued to the district court that cross-examination of Paez concerning this matter should be permitted because it could show bias or a motive to lie on his part. In particular, they argued that "Paez had a cloud over his head at the Miami Police Department [as a result of the Miami River Cops Scandal] and was motivated to clear himself by testifying against another alleged dirty cop." Furthermore, the appellants represented to the district court that although Paez had been cleared six years before the trial in this case, they had information that there might be an ongoing investigation into the scandal, possibly implicating Paez. They believed that the government should have provided them with information concerning any such investigation, and that they should have been permitted to cross-examine Paez about it.

Second, the appellants argued to the district court that they should have been able to cross-examine Agent Lucas concerning an investigation that was pending against him at the time of trial. Lucas was investigated by the DEA in July 1993 after the agency received a letter alleging that he had stolen twenty-three kilograms of cocaine during a cocaine seizure. Lucas was cleared after the investigation. In June 1994, however, the same source that had written the letter

made the same allegations about Lucas, and a second investigation was conducted. That investigation was pending when the trial in the trial of this case began.

After listening to the arguments of counsel, the district court granted the government's motions in limine to preclude cross-examination concerning the investigation of Paez and Lucas. The court felt that those investigations were "irrelevant, and even if [they were] relevant, [their] probative value is outweighed by [their] prejudice." The court also thought that the defendants had made an insufficient showing concerning the existence of an ongoing investigation into Paez's involvement in the Miami River Cops Scandal to permit cross-examination (or additional discovery) in that regard.

We review the district court's evidentiary decisions only for a clear abuse of discretion. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992). The parties basically agree on the framework applicable to the questions presented by the government's motions in limine. To the extent that the appellants sought to attack Paez's and Lucas' credibility, Rule 608(b) of the Federal Rules of Evidence controlled. That rule permits a party, under certain circumstances, to challenge the credibility of a witness with questions concerning past acts reflecting on the witness' character for truthfulness. That rule provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or

untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Fed. R. Evid. 608(b).

Although Rule 608 provides a district court with discretion to admit such evidence, "Rule 403 circumscribes the court's discretion by requiring the court to weigh the probative value of the evidence against the danger of unfair prejudice from it." *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1464 (11th Cir. 1994). Rule 403 provides that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

In addition to the rules of evidence, courts have long recognized that the Sixth Amendment's Confrontation Clause provides a criminal defendant with a right to cross-examine witnesses. This Court has stated that:

The district court's discretion in limiting the scope of cross-examination is subject . . . to the requirements of the Sixth Amendment. The right of confrontation guaranteed by the Sixth Amendment includes the right to cross-examination. Cross-examination has traditionally been allowed for the purpose of impeaching or discrediting the witness . In particular, the exposure of a witness' motivation in testifying has been labeled by the Supreme Court as an important

function of the Sixth Amendment right to cross-examination. *Lankford*, 955 F.2d at 1548 (citations omitted). Furthermore, "[c]ross-examination of a government 'star' witness is important, and a presumption favors free cross-examination on possible bias, motive, ability to perceive and remember, and general character for truthfulness." *United States v. Phelps*, 733 F.2d 1464, 1472 (11th Cir. 1984) (citation omitted). However, "the mere fact that [a defendant] sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination." *United States v. Diaz*, 26 F.3d 1533, 1540 (11th Cir. 1994). Instead, a defendant is only entitled to cross-examine a witness if "the information sought to be elicited [is] relevant." Id. (citations and quotations omitted); see also Phelps, 733 F.2d at 1472 (noting that cross-examination regarding potential bias "must be relevant").

In light of these standards, we believe that the district court acted well within its discretion in limiting the cross-examination of Paez and Lucas. First, with respect to Paez, the information which the appellants sought to elicit concerning the Miami River Cops Scandal was inadmissible under Rules 608 and 403. We find the *Ad-Vantage* case instructive in this regard. In that case, we held that cross-examination concerning two investigations by the Florida Bar Association and Florida Institute of Certified Public Accountants into the witness' possible ethical violations, which had not resulted in sanction, were inadmissible under Rules 608(b) and 403. In reaching that conclusion, we noted that the types of "[a]cts

probative of untruthfulness under Rule 608(b) include such acts as forgery, perjury, and fraud." *Ad-Vantage*, 37 F.3d at 1464. On the other hand, "[t]o infer untruthfulness from any unethical act 'paves the way to the exception which will swallow the Rule.'" Id. (citation omitted). We also reasoned that the fact no sanction had been imposed for the allegedly unethical conduct and the temporal remoteness of the investigations made the relevance of the information questionable. Id. Moreover, we held in *Ad-Vantage* that even if the cross-examination concerning the investigations of the ethical complaints was marginally relevant, it still should be excluded under Rule 403 because "[i]n these circumstances, when the allegations of wrongdoing were grave but no sanctions resulted, the danger was great that the jury would infer more from the investigation than was fairly inferable." Id.

The same reasoning applies in this case. The Miami River Cops Scandal occurred more than six years prior to the trial of this case. Paez was thoroughly investigated in connection with that scandal, but was never charged with any crime and only received a reprimand for failing to document a conversation with an informant. The conduct for which he was reprimanded does not indicate a lack of truthfulness. Given that the investigation was temporally remote from Paez's testimony in this case and that Paez's only sanction in connection with the scandal was completely unrelated to his character for truthfulness, we conclude that the district court properly concluded that it was irrelevant. Moreover, as in *Ad-Vantage*, we agree with the district court that any potential relevance of

the information was substantially outweighed by the possibility of unfair prejudice, and that it was due to be excluded under Rule 403.

Likewise, the district court did not abuse its discretion when it limited the cross-examination of Agent Lucas. The insertion into the trial of unproven allegations that Lucas had stolen cocaine had the obvious potential to cause serious and unfair prejudice to the government. In light of the fact that Lucas was cleared during the first investigation and that the second investigation concerned the same allegations from the same source, information concerning those investigations elicited during cross-examination would not have had much, if any, probative value.

Finally, the appellants have failed to show any basis for attributing bias to Lucas because of the investigations. They might have (but did not) suggest that he was trying to gain advantage in the investigation by pleasing the DEA and prosecutors. However, the jury knew that Lucas worked for the DEA and presumably factored in his allegiance to it when weighing his testimony. We do not believe that the existence of the investigation would have added anything (other than unfair prejudice) to the equation. Therefore, we conclude that the district court did not abuse its discretion by limiting the cross-examination of Lucas as it did under Rules 608(b) and 403 of the Federal Rules of Evidence.

G. LAY OPINION TESTIMONY REGARDING THE USE OF CODE WORDS

Appellants Humberto Rodriguez, Cuni, Lopez, Mercedes

Novaton, Rosell, Reynaldo Rodriguez, and Leopoldo Rodriguez challenge the district court's admission of testimony by some of the agents on the case concerning the use of code words by the defendants. At several points throughout the trial, the district court permitted law enforcement agents who had monitored the telephone wiretaps, as well as the supervisors of those agents, to testify concerning their understanding of the meaning of certain words used by the defendants in the taped conversations. For example, agents testified that when the defendants used the phrases "fifteen year old girl" or "fifty year old grandmother," they were actually referring to fifteen and fifty kilogram quantities of cocaine.

Over the objection of the defendants, the district court found that such testimony was admissible under Fed. R. Evid. 701 as lay witness opinion testimony which was rationally based on the perceptions and experience of the agents. The defense maintained that the testimony was actually expert testimony governed by Fed. R. 702, which should not have been admitted because the prosecution had not laid the proper foundation to qualify the witnesses as experts and because, contrary to Fed. R. Crim. P. 16(a)(1)(E) and the court's pre-trial orders, the government had not identified those witnesses as experts or provided summaries of their testimony before trial.

Rule 701 provides the standards for determining when a lay witness may provide testimony in opinion form. That rule, at the time of this trial in 1994,[9] provided as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Fed. R. Evid. 701. The appellants do not dispute that the testimony was "rationally based on the perception" of the witnesses, nor do they dispute that the testimony was "helpful" to the jury in understanding the witnesses' testimony or in determining "a fact in issue" in the case. Instead, the appellants argue that despite the satisfaction of each of the two prerequisites for admitting lay witness opinion testimony, the evidence should have been excluded because the testimony might also have been characterized as expert testimony subject to the requirements of Rule 702 because the agents' opinion testimony was based, in part, on their prior experiences.

The appellants' argument has superficial appeal because the agents' experiences in drug investigations could be viewed as the type of "specialized knowledge" falling under Rule 702. In fact, we have in the past affirmed the admission under Rule 702 of the expert testimony of a police officer interpreting "drug codes and jargon." *United States v. Brown*, 872 F.2d 385, 392 (11th Cir. 1989) (affirming admission of opinion that references to "paper," "candy," "dresses," related to the sale of cocaine). Also, at least one of our sister circuits has found that a district court committed error, albeit harmless, by admitting this type of testimony as lay witness opinion

testimony rather than expert opinion testimony. See *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1244-46 (9th Cir. 1997).

However, we do not accept the appellants' position , because it is based on the erroneous assumption (at least with respect to the pre-amendment version of Rule 701) that because an expert could provide the type of testimony at issue, a lay witness cannot. Our case law is squarely to the contrary. In *United States v. Myers*, 972 F.2d 1566 (11th Cir. 1992), this Court made clear that a witness does not fall outside of Rule 701 simply because his or her "rational[] . . . perception" is based in part on the witness' past experiences. In Myers, the defendant, a former police officer charged with depriving arrestees of their civil rights by using a stun gun, challenged a district court's admission of testimony that "reddish burn marks on [a victim's] back were consistent with marks that would be left by a stun gun." Id. at 1577. *Myers* argued that testimony should not have been admitted under Rule 701 because it "went beyond the everyday common knowledge of a lay person." Id. This Court rejected his argument concluding that the witness's "conclusion was rationally based upon his personal perception of [the victim's] back and his nineteen years of experience on the police force." Id. We further noted that "[t]o the extent that [the witness's] opinion lacked a technical/medical basis, [the defendant] had the opportunity to expose this on cross-examination," and the defendant's "objection to the evidence goes to its weight and not its admissibility." Id.; see also *Agro Air Assocs., Inc. v. Houston Casualty Co.*, 128 F.3d 1452, 1455 (11th Cir. 1997)

(affirming the admission of lay witness opinion testimony "based on the witnesses' personal observations and knowledge of, and experience in, the aviation industry"). Moreover, we have specifically held on a number of occasions that district courts did not abuse their discretion by permitting police officers to testify under Rule 701 about their understanding of the meaning of conversations by or with criminal defendants. For example, in *United States v. Awan*, we affirmed a district court's admission of testimony by an undercover agent concerning the "meaning and import" of statements that were part of tape-recorded conversations with the defendants. 966 F.2d 1415, 1430 (11th Cir. 1992). The defendants in that case argued that the jurors should have been permitted to reach their own conclusions about the meaning of the statements without the influence of the agent's interpretation. Id. We rejected that argument after finding that the agent's testimony was based on his perceptions of the conversations and that the testimony could have been helpful to the jury. Id. at 1430. See also *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986) (affirming admission of opinion under Rule 701 that when defendant stated that he "wanted to make a trip," he was referring to an illegal act); *United States v. Russell*, 703 F.2d 1243, 1248 (11th Cir. 1983) (affirming admission of agents' testimony interpreting tape-recorded conversations with defendants).

In light of these decisions, we believe that the district court did not abuse its discretion by permitting agents involved in this case to give opinion testimony based on their perceptions and on their experience as police officers about the meaning of

code words employed by the defendants in their intercepted telephone conversations. Moreover, the district court instructed the jury that the agents were not expert witnesses and that the jurors should independently determine the meaning of the statements. Also, each of the witnesses was subject to cross-examination by the appellants during which they challenged the agents' interpretations of the taped conversations. Under these circumstances, the appellants' objections go to the weight, rather than the admissibility, of the agents' testimony. See *Myers*, 972 F.2d at 1577. Therefore, the district court did not abuse its discretion.[10]

H. CONFLICT OF INTEREST OF CUNI'S ATTORNEY

Cuni contends that the district court erred by denying his motion for a new trial or to dismiss the indictment based on an alleged conflict of interest by one of his trial attorneys. Cuni maintains that his attorney labored under a conflict of interest by continuing his representation of Cuni despite the possibility that he was being investigated by the same United States Attorney's Office in connection with a different case. Cuni states that his attorney did not inform him of the possible conflict and did not seek his consent to continue his representation. Cuni also argues that the government engaged in misconduct when it failed to inform the district court or the defendants of the potential conflict resulting from the investigation of Cuni's attorney. The district court rejected Cuni's arguments, concluding that there was no showing of an "actual conflict" between the interests of Cuni and his attorney, and also that Cuni's representation had not been

"adversely affected" by any potential conflict.[11]

The factual basis for Cuni's claim relates to the possible connection between one of his attorneys, Michael Blacker, and a conspiracy charged in an unrelated case in which Blacker was counsel for a different defendant (named Martin). On October 18, 1994, approximately three and a half weeks after the trial in this case began, Blacker was served with a bill of particulars in that case, and in it the Assistant United States Attorney indicated that:

[I]n an abundance of caution and to the extent defendant MARTIN has not read the discovery, the government will restate those individuals, other than the charged co-conspirators, who may have furthered the objects of the conspiracy: . . . Michael Blacker.

The government maintains that despite this statement in the bill of particulars, Cuni's attorney did not have a conflict of interest because he was not under investigation by the United States Attorney's Office. In support of its position, the government provided a copy of notes taken by an attorney who represented Blacker during a June 1995 meeting with the Assistant United States Attorney. The notes indicate that Blacker's lawyer was advised during the meeting that Blacker was not a target of any investigation and that no indictment was contemplated against him. In light of these facts, and without the benefit of an evidentiary hearing, the magistrate judge recommended that Cuni's motion for a new trial or dismissal be denied, and the district court adopted that recommendation.

It is well-settled that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). The Supreme Court noted in *Cuyler* that "a defendant who shows that a conflict of interest actually affected his representation need not demonstrate prejudice in order to obtain relief." Id. at 349-50, 100 S. Ct. at 1719. However, the Court emphasized that "the possibility of conflict is insufficient to impugn a criminal conviction," and that absent a showing of actual conflict and adverse effect, a defendant is not entitled to relief. Id. at 350, 100 S. Ct. at 1719. Therefore, the Supreme Court has noted that there is no "per se rule of prejudice" in all cases involving potential conflicts of interest, but instead only a rule of presumptive prejudice where an attorney "'actively represented conflicting interests' and . . . 'an actual conflict of interest adversely affected [the] lawyer's performance.'" *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984) (citation omitted).

In *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (en ba nc), this Court discussed the two-part *Cuyler* test for reviewing claims involving conflicts of interest. First, we noted that "[a]n 'actual conflict' of interest occurs when a lawyer has 'inconsistent interests.'" Id. at 859 (citations omitted). The Court stated that:

In order to prove that an "actual conflict" hindered [the defendant's] lawyer's performance, [the defendant] "must

make a factual showing of inconsistent interests" or point to "specific instances in the record" to suggest an actual impairment of his or her interests. Overall, the "actual conflict" inquiry is fact-specific, consistent with the [defendant's] ultimate burden "to prove that his conviction was unconstitutional."

Id. (citations and quotations omitted). If a defendant is unable to show an "actual conflict," then he is not entitled to relief from his conviction because a "speculative or merely hypothetical conflict of interest does not yield a Sixth Amendment violation." *Burden v. Zant*, 24 F.3d 1298, 1305 (11th Cir. 1994).

If a defendant carries his burden of showing an actual conflict of interest, a court must then consider whether the conflict adversely affected his representation. In *Freund*, we summarized the "adverse effect" inquiry as follows:

To prove adverse effect, a [defendant] must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [defendant] need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the

alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Freund, 165 F.3d at 860 (citations and quotations omitted). In the absence of a showing of an "adverse effect," prejudice is not presumed to flow from a conflict of interest. Id.

Applications of these standards to the facts of this case reveal that Cuni is not entitled to relief based on the alleged conflict of interest. First we consider whether an "actual conflict" has been shown. As we noted in *Freund*, the inquiry into the existence of an actual conflict is "fact-specific." 165 F.3d at 859. Based on the evidence in the record, we cannot determine whether or not an "actual conflict" existed. The only evidence that the district court had before it on the issue was the bill of particulars indicating that Blacker might be an unindicted co-conspirator, and the representation, based on Blacker's attorney's notes from a meeting that occurred over six months after the end of the trial in this case, that Blacker was not a target of any investigation and was not expected to be indicted. We believe that this information was insufficient to permit the court to find that no actual conflict existed. In particular we note that reliance on the notes from the June 1995 meeting between Blacker's attorney and the Assistant United States Attorney are not persuasive because they apparently reflect only information that was given to Blacker after the conclusion of Cuni's trial in this case. Those notes do not indicate that no conflict existed earlier that should have been disclosed to Cuni and the district court.

Nonetheless, even if we assume that an actual conflict of

interest existed between Cuni and his attorney, we agree with the district court's alternative holding that Cuni has not, and cannot, show his attorney's performance was "adversely affected" by the conflict. Cuni has made absolutely no showing of any adverse effect resulting from his attorney's alleged conflict of interest, much less any "plausible alternative defense strategy or tactic" that was "reasonable under the facts." See *Freund*, 165 F.3d at 860 (citations and quotations omitted). The closest Cuni comes to articulating any adverse effect is a statement that he would have dismissed his attorney if he had been informed of the possible conflict, and a conclusory allegation that his attorney absented himself from the trial in this case in order to defend his own interests in the case in which he was named as a possible, unindicted co-conspirator. While the latter allegation might be a cause for concern if there were any factual basis supporting it, there is none.

Moreover, our own review of the record convinces us that Cuni's representation was not adversely affected by the possible conflict of interest. As the magistrate judge pointed out, "[t]his record is replete with examples of vigorous and relentless[] attacks by Blacker on the government's case and its agents." In particular, Blacker argued that Agent Lucas, the agent who filed affidavits in support of the various wiretaps, made intentional or reckless misrepresentations in support of the applications. Blacker also challenged the competence of the agents who monitored the wiretaps, and argued that those agents misunderstood the recorded statements. We agree with the magistrate judge that this aggressive approach could hardly

be seen as an effective way for an attorney to curry favor with the government.[12] Therefore, we conclude that Cuni has failed to show any "adverse effect" from the alleged conflict of interest entitling him to relief from his conviction.

Our opinion in *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987), on which Cuni heavily relies, does not require a different result. In *McLain*, we found that a defendant's Sixth Amendment rights were violated when his attorney had a conflict of interest because the same prosecutor was investigating that attorney on an unrelated matter. 823 F.2d at 1463. After noting that an attorney has an ethical obligation to inform his or her client about any potential conflict of interest, we considered whether the attorney's performance in that case was adversely affected by the conflict of interest. Id. at 1464. We found that "[t]here [was] substantial evidence that the United States attorney would not attempt to indict [the attorney] until [his client's] trial ended," and noted that this created an incentive for the attorney to forego plea bargain negotiations and to prolong the trial. Id. We also found that the attorney's conflict of interest affected his efforts to negotiate a plea bargain in several other specific respects. Id. These specific instances of "adverse effects" resulting from the conflict of interest distinguish McLain from this case. As we have already discussed, nothing in the record of this case suggests that Cuni's representation was affected in any way by the alleged conflict. Therefore, we reject this contention.[13]

I. SUFFICIENCY OF EVIDENCE SUPPORTING JORGE LOPEZ'S FIREARMS CONVICTION

Appellant Jorge Lopez challenges the sufficiency of the evidence to convict him of carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 924(c). Lopez, a former police officer, admits that he carried his service firearm during the events involved in this case, but argues that there was no evidence to suggest that he "employed the firearm or intended to employ the firearm in furtherance of any object or goal of the charged conspiracy."

In *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050 (1993), the Supreme Court addressed the meaning of the requirement that a firearm be used "during and in relation to" a "crime of violence or drug trafficking crime." 18 U.S.C. §§ 924(c)(1). The Court noted that "[t]he phrase 'in relation to' is expansive," *Smith*, 508 U.S. at 237, 113 S. Ct. at 2058, but the Court also said that the phrase, "at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." Id. at 238, 113 S. Ct. at 2058-59. In other words, the "gun at least must 'facilitate, or have the potential of facilitating,' the drug trafficking offense." Id. at 238, 113 S. Ct. at 2059 (citation and brackets omitted).

Viewing the evidence in the light most favorable to the government, as we must when reviewing the sufficiency of the evidence supporting a conviction, see *United States v. Leonard*, 138 F.3d 906, 908 (11th Cir. 1998), we have no trouble concluding that there was sufficient evidence to support Lopez's conviction for the §§ 924(c) offense. There

was evidence that Lopez, while armed, furthered the drug trafficking conspiracy by providing protection for and escorting co-conspirators to and from the Novaton residence while they were transporting drugs or drug proceeds. In light of that evidence, it was certainly reasonable for the jury to conclude that Lopez used his weapon, albeit a police-issued service firearm, "in relation to" the drug conspiracy and that his carrying the weapon facilitated, or had the potential for facilitating, the co-conspirators' drug trafficking. Therefore, we reject Lopez's sufficiency of the evidence argument.

J. THE FIREARM SENTENCING ENHANCEMENTS

The appellants, with the exception of Lopez, contend that the district court erred by applying a two-level enhancement to their base offense levels under the sentencing guidelines based on Lopez's possession of a firearm. See U.S.S.G. §§ 2D1.1(b)(1). The appellants argue that the district court erred because, they maintain, it was not reasonably foreseeable that Lopez's possession of a firearm was in furtherance of the conspiracy in that Lopez was required to carry his firearm because he was a police officer. That argument, essentially, is the same one that we have just rejected when it was made in the form of Lopez's sufficiency of the evidence contention. For the same reasons we discussed there, we reject the argument here, as well.[14]

Some of the appellants also challenge this enhancement on the grounds that the district court failed to make a specific factual finding that the appellants could reasonably foresee Lopez would possess a gun during the conspiracy. On numerous

occasions, this Court has found that the §§ 2D1.1(b)(1) firearm enhancement may be applicable to a defendant based on the possession or use of a weapon by a co-conspirator. See, e.g., *United States v. Otero*, 890 F.2d 366 (11th Cir. 1989). However, at the time that the district court sentenced the appellants, it was not entirely clear whether the co-conspirator's possession of the weapon must have been reasonably foreseeable to a defendant, and the district court did not make such a finding in this case. In *United States v. Gallo*, 195 F.3d 1278 (11th Cir. 1999), we clarified that in light of the requirements of U.S.S.G. §§ 1B1.3(a)(1)(b), which concerns sentence enhancements based on co-conspirator conduct, a district court must find that the "co-conspirator possession [of a dangerous weapon] was reasonably foreseeable by the defendant." Id. at 1284. Therefore, we held that:

> [F]or a §§ 2D1.1(b)(1) firearms enhancement for co-conspirator possession to be applied to a convicted defendant, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of the conspiracy at the time of possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.

Id.

Although several of the appellants argue that the district court erred by not making a specific finding as to the foreseeability that Lopez would possess a weapon, the only one to object on

this basis in the district court was Rosell.[15] Because we have found that Rosell is entitled to a new trial on other grounds, any error with respect to his sentence is irrelevant. Because the other appellants did not object in the district court, we consider only whether the district court's failure to make a factual finding in this regard was plain error. See *United States v. Gallego*, 247 F.3d 1191, 1196 (11th Cir. 2001). We have explained that:

> The four prongs of plain error review are: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." Before we may correct an error that was not timely raised, all four prongs must be satisfied.

Id. (citations and quotations omitted).

Under plain error review, none of the appellants are entitled to relief from the sentences imposed by the district court. Even if we assume that the district court erred by not making a finding concerning the foreseeability of Lopez's possession of a firearm and that the error was plain, the appellants cannot satisfy the third prong of the plain error test. In light of the ample evidence concerning Lopez's possession of his service firearm and the appellants' awareness of that possession, they cannot show that their substantial rights were affected by the lack of a specific finding. The fact that their arguments below focused on the lack of foreseeability that Lopez's weapon would be used in furtherance of the conspiracy, rather than on the lack of foreseeability of his possession of the weapon to

begin with, indicates that their knowledge of his possession of the weapon was not in dispute. Under these circumstances, we find no plain error. Therefore, we affirm the district court's enhancement of the appellants' sentences pursuant to U.S.S.G. §§ 2D1.1(b)(1).

K. CUNI'S CAREER OFFENDER ENHANCEMENT

Cuni's contends that the district court had no jurisdiction to enhance his sentence pursuant to 21 U.S.C. §§ 851 because of the timing of the government's service of its notice of intent to seek that enhancement. The parties are in agreement that the prosecution must file and serve its notice of intent to seek a §§ 851 enhancement prior to the commencement of trial. The only dispute is whether the government's service of notice in this case was timely.

The facts relevant to this issue are not in dispute. The government filed its notice of intent to seek a §§ 851 career offender enhancement on the day before trial commenced, and mailed the notice to Cuni's attorney on the same day. If service was complete on the day that the notice was mailed, then the notice was timely and the district court had jurisdiction to enhance Cuni's sentence pursuant to §§ 851. If, however, service was only completed sometime later, then the notice was untimely and the district court had no jurisdiction to enhance Cuni's sentence. See *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998) (noting that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of §§ 851(a)").

Cuni argues that the method for determining when service was complete is controlled by Fed. R. Crim. P. 45(e), which provides, in relevant part, that:

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.

Fed. R. Crim. P. 45(e). Cuni's position is that Rule 45 requires us to add three days to the effective date of service of the notice, which would make it untimely.

The government, on the other hand, maintains that Fed. R. Crim. P. 49 controls our determination. Rule 49 provides that service should be made on a criminal defendant's attorney "in the same manner provided in civil actions." The relevant civil rule, Fed. R. Civ. P. 5(b), states:

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. . . . Service by mail is complete upon mailing.

The government argues that its §§ 851 notice was timely pursuant to these rules, because it was mailed the day before trial, and service was complete on that day.

We find Cuni's argument, premised on Fed. R. Crim. P. 45(e), unpersuasive for two closely related reasons. First, by its terms, Rule 45 only applies in situations in which a defendant "has the right or is required to do an act within a prescribed period after the service of a notice." However, although §§ 851 provides that a defendant may file a response to the prosecution's notice denying the allegations, see 21 U.S.C. §§ 851(c), it does not prescribe a period in which that response must be filed. Therefore, by its own terms, Rule 45 is inapplicable in this context. Second, even if Cuni had been required to file a response within a certain period, Rule 45 would operate only to extend the period for filing; it would not affect the date on which service on Cuni was complete. Rule 45 does not address when service is complete.

But Rule 49 (b), in conjunction with Fed. R. Civ. P. 5(b), does address when service of a §§ 851 notice is complete. Those rules clearly state that such "[s]ervice by mail is complete upon mailing." That means that service of the government's §§ 851 notice in this case was completed the day before the trial began, in conformance with the procedural requirements of 21 U.S.C. §§ 851(a)(1). Therefore, the district court had jurisdiction to enhance Cuni's sentence.

L. THE APPELLANTS' APPRENDI CHALLENGES

Each of the appellants contends that his or her sentence runs afoul of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Because none of the appellants raised timely constitutional objections on the *Apprendi* issues, our review of these claims is limited to plain

error.[16] See *United States v. Candelario*, 240 F.3d 1300, 1308 (11th Cir. 2001). The usual four-prong plain error test applies to *Apprendi* issues. See id.

The first two steps of plain error review concern whether there is error and, if so, whether it is plain. In the context of drug cases under 21 U.S.C. §§ 841, our decisions have held that sentencing a defendant in excess of twenty years (the statutory maximum under §§ 841(b)(1)(C) absent a finding concerning drug quantity) without a quantity determination by the jury constitutes "error" for purposes of plain error review, and that the error is "'plain' even though the law was different at the time of the defendant's conviction and sentencing." *Candelario*, 240 F.3d at 1309. On the other hand, sentencing a defendant to twenty years or less without such a determination is not error, plain or otherwise, under *Apprendi*. See *United States v. Gerrow*, 232 F.3d 831, 834 (11th Cir. 2000).

Application of the first two prongs of the plain error review to the facts of this case defeats the *Apprendi* challenges of four of the appellants.[17] Appellants Mercedes Novaton, Jorge Lopez, Leopoldo Rodriguez, and Ramon Rosell were each sentenced to less than twenty years with respect to their convictions under 21 U.S.C. §§ 841 or 21 U.S.C. §§ 846.[18] Therefore, under *Gerrow* none of their sentences violate *Apprendi*. The sentences for each of the other five appellants, however, exceeds the twenty-year threshold, and imposing those sentences without a drug quantity determination by the jury constitutes error that is plain. (The indictment alleged only a

detectible quantity of cocaine.) As to the sentences of those five appellants, we must proceed to the third prong of the plain error analysis.

The third prong of plain error analysis is the one that has proved most difficult for defendants pressing *Apprendi* issues. This prong "asks whether the error affected the defendant's substantial rights." *Candelario*, 240 F.3d at 1310. See also Fe d. R. Crim. P. 52(b). In several cases we have found that a defendant's substantial rights were not affected where a rational jury could not have found the defendant guilty of the drug offense without also finding beyond a reasonable doubt that the offense involved a quantity of drugs sufficient to increase the statutory maximum to where it is equal to or greater than the defendant's sentence. See e.g., *United States v. Swatzie*, 228 F.3d 1278, 1282-83 (11th Cir. 2000). Put another way, "[w]e must affirm [a] Defendant's sentence if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity." *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

To apply this approach, we must first determine the minimum quantity of drugs which a jury must have found beyond a reasonable doubt to be involved in the substantive offense in order to bring the defendant's sentence within the statutory maximum. The requisite drug quantity is determined by reference to §§ 841's three penalty provisions. As mentioned above, §§ 841(b)(1)(C) has no quantity requirement, and permits a sentence up to twenty years for offenses involving any detectable quantity of cocaine. For offenses involving 500

grams or more of cocaine, §§ 841(b)(1)(B) applies and permits a sentence of not less than five years and not more than forty years. Finally, if the offense involves five kilograms or more of cocaine, §§ 841(b)(1)(A) permits a sentence from ten years to life.[19]

Application of the third prong of the plain error analysis in light of §§ 841's penalty provisions yields the following results. If a defendant's sentence exceeded twenty years, but was less than forty years, the defendant's substantial rights were not affected unless the defendant shows an evidentiary basis on which the jury that found the defendant guilty also could have rationally found that the quantity of cocaine involved was less than 500 grams. If a defendant's sentence exceeded forty years, the defendant's substantial rights were not affected unless the defendant shows an evidentiary basis on which the jury that found the defendant guilty also could have rationally found that the quantity of cocaine involved was less than five kilograms.

Appellants Francisco Novaton, Matamoros, Humberto Rodriguez, and Reynaldo Rodriguez were each sentenced to terms of imprisonment between twenty and forty years. Therefore, in order to show an effect on their substantial rights, each must show that there was evidentiary basis on which the jury that convicted him rationally could have found that the offense involved less than 500 grams of cocaine. As for Cuni, who received a life sentence, he must point to an evidentiary basis on which the jury could have found that the offense did not involve at least 5 kilograms of cocaine.

Francisco Novaton, Matamoros, Humberto Rodriguez, and Reynaldo Rodriguez have not pointed to any evidentiary basis, and the record shows there was none, for the jury to have found that the offenses for which they were convicted involved less than 500 grams of cocaine. The same is true as to Cuni and the five kilogram minimum for the life sentence maximum. No evidence indicated that cocaine was ever trafficked by these conspirators in any amount less than a kilogram. For example, the three drug seizures related to this conspiracy were in the amounts of three kilograms, four kilograms, and eight kilograms. Furthermore, the only evidence concerning Count 5 of the indictment, of which Francisco Novaton, Cuni, and Humberto Rodriguez were each convicted, indicated that the transaction involved sixty-five kilograms of cocaine. During their sentencing hearings, each of the appellants challenged the district court's drug quantity determinations, but none suggested that the conspiracy involved less than 500 grams of cocaine. And Cuni's counsel conceded to us during oral argument that the jury could not have convicted him of the counts on which he was found guilty without necessarily finding that the quantity of cocaine involved exceeded five kilograms. Because of the complete absence of any evidence which would have permitted the jury to conclude that any of the offenses for which the appellants were convicted involved less than the amount necessary to kick in the statutory maximum equal to or higher than the sentences imposed upon them, none of their substantial rights were affected by any *Apprendi* error. [20]

III. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND the conviction of Appellant Ramon Rosell. We also REMAND the case insofar as Appellant Reynaldo Rodriguez is concerned in order for the district court: to attempt to reconstruct any missing exhibits introduced at trial which are relevant to his claim that the court erred by not allowing him to introduce impeachment evidence pursuant to Fed. R. Evid. 806; to decide that Rule 806 issue involving him; and to decide any related issues stemming from the missing exhibits that are relevant to the Rule 806 issue Reynaldo Rodriguez has raised. In all other respects, we AFFIRM the convictions and sentences of all the appellants.

FOOTNOTES

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*. Honorable James L. Oakes, U.S. Circuit Judge for the Second Circuit, sitting by designation.

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1. The nine appellants have raised a plethora of issues related to their convictions and sentences. We have carefully considered all of their arguments, but some do not merit any discussion. We summarily reject all of those arguments that are not mentioned in this opinion.

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2. A somewhat more lenient standard is applied when a

defendant is represented by a new attorney on appeal, and the defendant need only show that "there is a substantial and significant omission from the trial transcript." *Medina*, 90 F.3d at 463. In this case, however, Reynaldo Rodriguez was represented by the same attorney both at trial and on appeal, and, consequently, he would have to show hardship and prejudice in order to be entitled to a new trial.

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3. We are assuming for present purposes that his counsel could and did waive Rosell's absence on the days that he said he was doing so. Rosell does not argue to the contrary. Counsel did not purport to waive his client's presence on November 15 - 18.

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4. Rosell's counsel's consent to the continuation of the trial when Rosell initially fell ill, and while the evidence being presented did not involve him, did not extend to November 15 - 18. Counsel repeatedly made clear to the court that any waiver of Rosell's right to be present was only effective during the portions of the trial which were unrelated to Rosell. This limited waiver obviously did not apply to the last several trial days when Rosell was absent, days during which the trial focused upon him. As we have indicated, the fact that Rosell, through counsel, was willing to waive his presence during the part of the trial that did not directly relate to him is evidence of his good faith.

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5. We recognize that the harmless error standard is less

stringent in the case of violations of nonconstitutional rules than it is for constitutional violations. See, e.g., *United States v. Guzman*, 167 F.3d 1350, 1353 (11th Cir. 1999) ("In cases of nonconstitutional error in criminal cases, we apply the federal harmless-error statute, which provides that on appeal we must ignore errors or defects which do not affect the substantial rights of the parties. 28 U.S.C. §§ 2111. In applying this test, we use the *Kotteakos* standard, which teaches that a nonconstitutional error requires reversal only if it resulted in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." (citations and quotations omitted). Because this case involves violations of both constitutional provisions and a rule of criminal procedure, reversal is required unless the more exacting harmless error test is met.

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6. In fact, Finney appears to be the only case in which this Court found harmless a defendant's absence during the examination of witnesses. 709 F.2d at 646. That case offers little support for the government's position because it involved only a brief absence during which the defendant went to the restroom, whereas this case concerns Rosell's absence during a portion of the government's case-in-chief as well as the entirety of the defense case. Id. Moreover, the Court in *Finney* concluded that the defendant's absence was voluntary. Id. For reasons we have already discussed, the same cannot be said about Rosell's absence.

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7. There is some confusion in the record concerning whether one of the jurors struck by the government, Ms. Michelsen, was Hispanic. We will assume that she was.

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8. Rule 701 was amended in 2000 to add subpart (c), which limits the admission of lay witness opinion testimony to testimony that is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

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9. Despite our conclusion, we note that it is an open question whether the amendments made to Rule 701 in 2000 might require a different result if the trial were held today. Those amendments limit lay witness opinion testimony to that which is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). The stated purpose behind the 2000 amendments was "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, Advisory Committee Notes to 2000 amendments. It could well be that the experiences which provided the testifying agents with a basis for rationally perceiving the information provided in their opinion testimony in this case would constitute "specialized knowledge," and that such testimony would now be admissible only under Rule 702. We leave that question for another day, however, because the district court did not abuse its discretion by admitting the agents' testimony

under the version of Rule 701 in effect at the time of the trial in this case.

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10. "Questions involving conflicts of interest are mixed determinations of law and fact subject to de novo review." *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994).

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11. We note that Cuni had an additional attorney at trial, Mr. Villalobos, who did not suffer from any conflict of interest. The presence of co-counsel unaffected by the alleged conflict of interest makes it even less likely that Cuni's representation was adversely affected by the alleged conflict.

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12. Although we conclude that Cuni's attorney provided him with adequate representation which was unaffected by the alleged conflict of interest, we note that it would certainly have been preferable for the attorney, as well as the prosecution, to inform Cuni and the district court of the circumstances surrounding the potential conflict of interest. Under the facts of this case, however, their failure to do so did not amount to a violation of the Sixth Amendment.

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13. This Court recently reached the same conclusion in a factually similar case in which a firearm enhancement was made based on the possession of a service weapon by an INS inspector who participated in a drug conspiracy. See U.S. v.

Audain, 254 F.3d 1286, 1290 (11th Cir. 2001). In that case, we held that the defendant had not carried his burden of proving that it was "clearly improbable" that the presence of the weapon was relevant to the offense. Id. *Audain* supports our conclusion, discussed above, that Lopez's weapon facilitated, or had the potential of facilitating, the crime of drug trafficking, and supports the application of the firearm enhancement to the other appellants in this case.

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14. In its brief, the government indicates that Humberto Rodriguez also objected on this basis. However, a review of the sentencing transcript reveals that his objection only concerned the foreseeability that Lopez's weapon was possessed or used in furtherance of the conspiracy, and not the foreseeability that Lopez possessed a weapon in the first place.

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15. "The four prongs of plain error review are: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must 'seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Gallego*, 247 F.3d 1191, 1196 (11th Cir. 2001) (quoting Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997)).

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16. The same is true with respect to Francisco Novaton's sentence on his conviction for operating a continuing criminal enterprise in violation of 21 U.S.C. §§ 848. Because that

provision provides for a statutory maximum sentence of life imprisonment, Novaton's 30 year sentence on that count does not violate *Apprendi*. Nonetheless, we will assume for present purposes only that the issue of whether Novaton's concurrent 30 year sentence on each of the other counts in the indictment violate *Apprendi* remains viable.

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17. The drug conspiracy statute under which each of the appellants was convicted, 21 U.S.C. §§ 846, incorporates the penalty provisions applicable to the object of the conspiracy, in this case 21 U.S.C. §§ 841. Therefore, the *Apprendi* analysis of conspiracy convictions in this case is identical to the analysis applicable to substantive possession counts brought under 21 U.S.C. §§ 841.

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18. Each of the subdivisions of §§ 841(b)(1) provides for a higher range of penalties if certain factors are present, such as a prior felony drug conviction, but consideration of those factors are not relevant to our analysis in this case, because the analysis yields the same result regardless of whether they are considered.

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19. Because we conclude that no appellant's substantial rights were affected by any *Apprendi* error, we will not consider the fourth prong of the plain error analysis.

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
MAR 05, 2002
THOMAS K. KHAN
CLERK

No. 95-4445-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a.k.a. Chino Rodriguez, ET AL.,

Defendants-Appellants.

No. 98-4988-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR CUNI,

Defendant-Appellant.

No. 98-5045-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON ROSELL,
a.k.a. Papito,
OSCAR CUNI, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: ANDERSON, Chief Judge, CARNES and OAKES*, Circuit Judges.

BY THE COURT:

Appellant Felipe Matamoros' motion to adopt Co-Appellant Reynaldo Rodriguez's petition for rehearing and supplemental authority, which is construed as a motion for reconsideration of this Court's January 23, 2002 Order denying Appellant Matamoros leave to file his rehearing petition out of time, is Denied.

Appellant Oscar Cuni's motion to adopt Co-Appellant Reynaldo Rodriguez's petition for rehearing and supplemental authority, which is construed as a motion for reconsideration of this Court's January 23, 2002 Order denying Appellant Cuni leave to file his rehearing petition out of time, is Denied.

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* Honorable James L. Oakes, U.S. Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX A-3

AO 245 S (Rev. 4/90 (S.D.Fla. rev.) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Southern District of Florida

UNITED STATES OF AMERICA -

v. Case Number: 93-597-CR-MOORE(2)

Filed by _____ D.C.
MAY 24, 1995
CARLOS JUENKE
CLERK U.S. DIST. COT.
S.D. OF FLA. MIAMI

OSCAR CUNI #05822-004
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, OSCAR CUNI #05822-004, was represented by Michael Blacker, Esq. and Jose Villalobos, Esq.

The defendant has been found not guilty on counts) 2 and is discharged as to such count(s).

The defendant was found guilty on counts 1 and 5 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to Possess with Intent to Distribute Cocaine	12/5/93	1
21:841 (A)(1) & 18:2	Possession with Intent to Distribute Cocaine	11/4/93	5

As pronounced on May 24, 1995, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for counts) 1 and 5, which shall be due immediately. ,

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 24th day of May, 1995.

S/ K M Moore

K. MICHAEL MOORE
United States District Judge

Defendant's SSAN: 265-84-4170
Defendant's Date of Birth: 3/5/41
Defendant's address: to custody <label R11-1178>

Defendant: OSCAR CUNI #05822-004
Case Number: 93-597-CR-MOORE(2)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons imprisoned for a term of the defendant's life as to each of Counts 1 and 5, said sentences of confinement are to run concurrently with each other.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to ____ at _____ _____, with a certified copy of this Judgment.

_____
United States Marshal

By:_____
Deputy Marshal

Defendant: OSCAR CUNI # 05822-004
Case Number: 93-597-CR-MOORE(2)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TEN (10) YEARS as to each of Counts 1 and 5, said sentences are to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shell not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully ell inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or

administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any tune at home or elsewhere and shell permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours o/ being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a few enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

APPENDIX A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)		CASE NO. 93-597-CR-MOORE
	)	(Magistrate Judge Johnson)
v.	)	
	)	
FRANCISCO NOVATON, et al.	)	
	)	

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court following a three day hearing, held on December 18-20, 1997, on the below listed post-trial motions:

(1) Defendant Reinaldo Rodriguez's (hereinafter "Rodriguez") pro se Motion on Rule 33 Based on Newly Discovered Evidence for Dismissal of the Indictment as a Result of Governmental Misconduct (Docket Entry, "D.E." 1389), filed on June 10, 1996;[1]

(2) Rodriguez's Motion for New Trial Based Upon Newly Discovered r Evidence (D.E. 1391), filed on

[1]Rodriguez's pro se motion was joined and supplemented by Rodriguez's counsel on October 1, 1996. (D.E. 1428).

June 20, 1996;[2]

(3) Rodriguez's pro se Motion for New Trial Based Upon Newly Discovered Evidence Pursuant to Rule 33 of the Federal Rules of Criminal Procedure (D.E. 1220), filed on July 6, 1995; and

(4) Defendant Oscar Cuni's (hereinafter "Cuni") Amended and Renewed Motion for New Trial Based on Post-Trial Motion to Suppress Electronic Surveillance (D.E. 1 137), filed on May 2, 1995.

After a full evidentiary hearing on the above styled motions and being otherwise duly advised on the matters raised, it is the **RECOMMENDATION** of the undersigned Magistrate Judge that, for the reasons stated below, the above styled motions for new trial be **DENIED**.

R17-1543 - R17-1601

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[2]This motion was also supplemented by Rodriguez on October 1, 1996. (D.E. 1428).

STANDARD

A new trial is warranted based upon circumstances coming to light after the trial or otherwise "newly discovered" only if all of the following five elements are satisfied: (1) the evidence was in fact discovered after trial; (2) the defendant exercised due care to discover the evidence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material; and (5) the evidence was of such a nature that a new trial would probably produce a different result. United States v. Starrett, 55 F.3d 1525, 1554 (11th Cir. 1995). Failure to satisfy any one of the above five elements is "fatal" to a motion for new trial. United States v. Lee, 68 F.3d 1267, 1272 (11th Cir. 1995).

ANALYSIS

On December 18-20, 1996, this Court conducted an evidentiary hearing on the pending motions for new trial.[3] In addition, this Court is quite familiar with this matter having conducted lengthy suppression hearings in August 1994, prior to the trial in this cause.

1. No Prosecutorial Misconduct Regarding Grand Jury.

On June 10, 1996, Rodriguez filed a pro se motion, titled Motion on Rule 33 Based on Newly Discovered Evidence for

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[3]Three different court reporters transcribed different portions of the post-trial hearing. To avoid confusion, the Court refers to the transcripts as follows: the transcript for the morning session held on December 18, 1996, will be referred to as Transcript I; the transcript for the afternoon session held on December 18, 1996, will be referred to as Transcript II; and the transcript for December 19 & 20, 1996, will be referred to as Transcript III. 2

Dismissal of Indictment as a Result of Governmental Misconduct. (D.E. 1389). On October 1, 1996, Rodriguez's counsel joined in the instant motion by filing a supplemental memorandum. (D.E. 1428).

Rodriguez contends that the government engaged in misconduct significant to warrant dismissal of the indictment by presenting false information to the grand jury. prior to the indictment. As evidence of his claim, Rodriguez attaches the grand jury testimony of Drug Enforcement Administration (DEA) Case Agent Lee Lucas. This testimony was provided by the government to Rodriguez prior to the pretrial suppression hearings -- some seven weeks prior to trial -- as Jencks material pursuant to 18 U.S.C. §3500 et seq.

Before the grand jury, Agent Lucas related an event that was observed by surveillance agents during the investigation. According to Agent Lucas' testimony, Rodriguez returned to Novaton's home (the cocaine distribution location) with a drug conspirator in the same car (Rodriguez's white porsche) after the drug conspirator who was carrying drug proceeds had detected the government's surveillance agents. Rodriguez's counsel cross-examined Agent Lucas on this event during the pretrial motions to suppress. See Exhibits to Rodriguez's Motion. Agent Lucas testified that, as related to him by other officers, he believed Rodriguez and the drug conspirator had arrived in the same vehicle, but nonetheless they had arrived at Novaton's residence after retrieval of the drug conspirator and a large amount of money derived from drug sales. Id.

At trial, Rodriguez's counsel cross-examined several witnesses on this topic. Jd. At trial, the government's evidence

on this matter was that Rodriguez and the drug conspirator returned to Novaton's house in separate cars. Rodriguez again supplies the necessary excerpts of the trial transcript as attachments to his motion. Finally, the Court reviewed at the pretrial hearing, as well as again during the post-trial hearing the admissions made by Rodriguez following his arrest. Regarding the above incident, Rodriguez admitted that he traveled with two female members of the Novaton house to pick up the drug conspirator and his vehicle which the conspirator abandoned thinking he was being followed. Rodriguez further admitted in his post arrest statement that one of the female conspirators retrieved a large bag of U.S. currency derived from drug sales.

The inaccurate testimony provided by Agent Lucas to the grand jury is that the drug conspirator returned with Rodriguez in the same car. For purposes of this Court's analysis, it is beyond dispute that Rodriguez left with members of the Novaton family to retrieve another drug conspirator, the drug conspirator was returned to the Novaton residence, a bag containing drug proceeds was also recovered and Rodriguez returned to the Novaton residence in the same car with a member of the Novaton family at or around the same time as the drug conspirator.

Rodriguez's instant motion is not based upon newly discovered evidence after trial. Rodriguez's own attachments to the instant motion belie his contention that the information was newly discovered after trial. In fact, Rodriguez was provided the grand jury testimony of Agent Lucas in the beginning of August, 1994, some seven weeks prior to the trial

in this matter. Rodriguez's counsel even cross-examined Agent Lucas with the inaccurate grand jury testimony during the pretrial suppression hearing. During the trial itself, Rodriguez's counsel cross-examined several witnesses concerning this matter as part of his theory of defense. Rodriguez has failed to satisfy the first prong of the Eleventh Circuit's standard for granting a new trial.

The Court also finds that Rodriguez's instant motion was not timely filed. Rule 33, Fed.R.Crim.P., allows the trial court on a defense motion to grant a new trial if required in the interests of justice. However, a defendant has only seven days, or a period of time affixed by the court prior to the expiration of the seven days, following the verdict, unless a defendant can demonstrate his motion is based on newly discovered evidence. See Rule 33.

For the reasons stated above, Rodriguez's instant motion does not contain newly discovered evidence. Therefore, Rodriguez had seven days from the date of his verdict to file the instant motion or a period of time fixed by the trial court during the seven day period to file his instant motion. The jury returned a verdict of guilty against Rodriguez on December 15, 1994. Rodriguez was sentenced on May 5, 1995. On June 6, 1996, over one and a half years after his guilty verdict, Rodriguez filed the instant motion.[4] The record is devoid of any order in this matter entered into by the trial court during the seven day period following the verdicts which allowed for

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[4]Rodriguez's requested relief is not a riev trial but, by the very style of his pleading, he seeks dismissal of the indictment.

Rodriguez to file his pro se motion one and a half years after the verdict.

As for any claim of prejudice, Rodriguez's cross-examination at the pretrial hearing and further use of the information at trial as part of his defense militates against any claim of prejudice. The Eleventh Circuit has repeatedly held that the government's failure to disclose inaccurate or perjurious grand jury testimony until during the trial is not grounds for reversal where any possible prejudice was cured by the defense counsel's cross-examination of a witness at trial or further exploration of the inaccuracy at trial. See, e.g., United States v. Knight, 867 F.2d 1285, 1289 (11th Cir. 1989); United States v. Jacoby, 955 F.2d 1527, 1538 (11th Cir. 1992); see also United States v. Bueno-Sierra, 99 F.3d 375, 380 (11th Cir. 1996)(witness' false testimony during trial found not to be prejudice which would materially affect jury verdict where defense counsel allowed to fully explore false testimony through cross-examination).

As for Rodriguez's claim of misconduct by the government in presenting false and incorrect testimony to the grand jury, the Eleventh Circuit has rejected similar claims. See United States v. Garate-Vergara, 942 F.2d 1543, 1550 (11th Cir. 1991)(citing United States v. Ricks, 817 F.2d 692, 695-96 (11th Cir. 1987)). It is undisputed that at trial the government did not rely on the incorrect or inaccurate grand jury testimony of Agent Lucas to seek Rodriguez's conviction and that Agent Lucas corrected his grand jury testimony to the extent a correction was required during the pre-trial hearings in this cause. A conviction beyond reasonable doubt without

the use of the alleged misconduct at trial makes it highly improbable that the grand jury indictment was based on insufficient probable cause. W. Even false testimony before the grand jury does not automatically require dismissal of the indictment:

> This Court has indicated that the possibility that a witness may have given false testimony before the grand jury does not automatically vitiate an indictment based on that testimony; to dismiss an indictment the district court must also find an abuse of the grand jury process such as perjury or government misconduct.

Id. (quoting United States v. DiBernardo, 775 F.2d 1470, 1475 (11th Cir. 1985)).

In Garate-Vergara, the Eleventh Circuit found that an agent did not commit perjury or intentional misconduct where he incorrectly testified before the grand jury from information provided to him by Coast Guard officers during a boarding of a vessel. Garate-Vergara, 942 F.2d at 1550. Similarly, Agent Lucas incorrectly testified before the grand jury from information related to him by surveillance officers that Rodriguez and a drug conspirator arrived at the drug distribution house together in Rodriguez's porsche.

In light of the other evidence such as Rodriguez's post arrest statement admitting his retrieval of the drug conspirator and the large amount of drug proceeds, there existed ample evidence upon which a jury could base Rodriguez's conviction. See, e.g., United States v. Starrett, 55 E.3d 1525,

1554 (11th Cir. 1995). Therefore, the instant motion should be denied because it is not based on newly discovered evidence; was not filed within the time allotted by Rule 33, Fed.R.Crim.P.; and the misconduct alleged does not rise to the level that would affect the integrity of the jury verdict against Rodriguez.

2. The Government's Brady Obligations Met.

On June 20, 1996, Rodriguez filed a Rule 33 Motion for New Trial Based upon Newly Discovered Evidence. (D.E. 1391). Rodriguez suggests that the government had in its possession evidence of ~a pending indictment, investigation or allegations of misconduct concerning a government witness, City of Miami Police Detective Eladio Paez, yet failed to disclose the information despite repeated requests by Rodriguez.[5]

At the post-trial hearing, Rodriguez called former City of Miami Police Officers Estrada and Garcia to testify that prior to the trial in this cause they both were debriefed by

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[5]Prior to and during trial, Rodriguez requested information concerning what he described as an ongoing investigation and pending indictment against Detective Paez. The government has consistently denied the existence of any present or past investigation or pending indictment against the detective. After the trial in this cause, Rodriguez requested any allegations of misconduct or information received from convicted former City of Miami Police Officer in the River Cops Case (Case No. 86-511-CR-Ryskamp). Rodriguez has focused on information possessed by former police officers and now convicted felons, Armando Estrada and Armando Garcia. The government argues that the information from these two individuals does not fall under the government's Brady obligations.

government prosecutors and agents assigned to the River Cops case and that they gave information concerning the misconduct of Detective Paez in 1985.

Estrada testified first for Rodriguez on December 18, 1996. See Transcript II, pp.48-61. In sum, Estrada's testimony concerning Paez is as follows:

> [Detective] Paez was at my daughter's birthday [party at a public restaurant], I started talking about what I had done, in reference to the River Cops, and he told me while he was searching some house or something, in a narcotics search, he found some money behind a desk, that he was going to take it, but he didn't, because there were other officers around.
>
> He told me, in the future, if he had the chance, he would take the money.

See Transcript II, p.41.

According to Estrada, he was debriefed by the prosecutors and agents assigned to the River Cops case in early 1994 and again in early 1995 and related the above information to the government. See Transcript II, pp. 49 & 52. Estrada testified that his conversation with Detective Paez occurred in Oetober 1985. See Transcript II, p.50.

The second witness, Garcia, testified for Rodriguez on December 19, 1996. See Transcript III, pp. 79-112. In sum, Garcia is testimony concerning Detective Paez is as follows:

> In the early months of 1985 . . . [Estrada] told me that there was going to be a boat that was

> going to be docked near Jones' boatyard. And that on that particular boat, there was going to be a load of cocaine. He, also, told me at this time that he wanted to include an individual who was a police officer at the time by the name of Eladio Paez. . . I was supposed to rent all of the equipment to cut the boat with, which I was going to rent at Dixie Highway... Then, Estrada told me that once we would get that load, Eladio Paez was going to arrest some of the people on the boat and some merchandise was going to be taken by us... Stolen.

See Transcript III, pp. 85-86. According to Garcia, Estrada told further him that:

> Armando Estrada told me that he had once been at a -- Armando Estrada was a friend of Eladio Paez. And [Estrada] said -- he told me that Eladio Paez had told him that he had gotten some money I from a drug raid they had done. And he had bought a [Jeep] Cherokee.

See Transcript III, p.87.

Garcia claims he was interviewed. by government prosecutors and agents assigned to the River Cops Case in 1994 and related the above to the government. See Transcript III, p. 84. During cross-examination, Garcia testified that Estrada would confirm the information that he provided to him about Detective Paez, if Estrada were called to testify. See Transcript III, p.96. However, Estrada's testimony failed to

support Garcia's contention. Garcia further testified on cross-examination that he never spoke to Detective Paez personally, did not know Detective Paez and his information had come exclusively from Armando Estrada. See Transcript III, pp. 87, 92-93 & 97.

Garcia admitted that he "didn't trust" Paez; could not say whether Detective Paez was a "good cop" or "bad cop" as he never met Detective Paez; and that he knew Detective Paez would [travel up and down the Miami River looking for boats transporting drugs in order to make the big bust or legitimate arrest.[6] See Transcript III, pp.90-109.

At the outset, the Court notes the obvious difference in the testimony between Estrada and Garcia. Further, Garcia's testimony is based entirely on hearsay statements from Estrada. Statements which Estrada failed to confirm when he testified. In short, the witnesses presented by Rodriguez in support of the instant motion raise significant credibility concerns about themselves and the information they provided during the hearing. Finally, Estrada's testimony, if believed, was not about an act or acts of misconduct of Detective Paez but rather a conversation in which-Detective Paez purportedly indicated that he almost stole money but did not and that in the future he might steal money.

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[6]Garcia testified that he used the phrase "didn't trust" Detective Paez to mean that his illegal clan of police officers was getting too big and he did not want Detective Paez to join because, if something Went wrong, someone might talk, See Transcript III, pp. 89-90 & 92.

In a criminal proceeding where the court also serves as the fact finder, it remains uniquely within the role of the court to judge the credibility of the witnesses. United States v. Thomas, 93 F.3d 479, 486 (8th Cir. 1996); Stano v. Butterworth, Sl F.3d 942, 944 (1 lth Cir. 1995). After having heard the testimony of Estrada and Garcia, the Court questions the material nature of that testimony as it relates to Detective Paez and the allegations made by Rodriguez in the instant motion.

Before the trial in this cause, the government filed a motion in limine to exclude all references to Detective Paez's suspension from duty in 1986 and the underlying investigation into possible wrongdoing. (D.E. 706); See Transcript II, p.64 & Transcript III, p.300. After hearing argument from counsel, the trial judge granted the government's motion in limine and excluded all reference to Detective Paez's suspension and ensuing investigation in 1986. See Transcript III, pp. 300-301. This further compounds Rodriguez's efforts to show that a Brady violation has occurred.

To establish a Brady violation, a defendant must show that "(1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defense or exculpatory, and (3) the evidence suppressed was material." United Stated v. Massey, 89 F.3d 1433, 1443 (11th Cir. 1996)(quoting Starrett, 55 F.3d at 1555). The mere possibility that undisclosed information might help the defense, or might affect the outcome at trial, does not establish materiality in the constitutional sense. United States v. Agurs, 427 U.S. 97, 109 (1976). Evidence is material if there exists a "reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different." Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1565 (1995).

The information presented by Rodriguez, even ignoring for the moment the Court's credibility concerns, is not material. The trial judge resolved the issue of materiality when the government's motion in limine was granted and the defense was precluded from referring to any internal affairs investigations or suspensions of Detective Paez from 1986. Detective Paez's suspension and the ensuing investigation was in relation to the fall-out generated by the River Cops case in 1986; Detective Paez was cleared and returned to active duty. See Government Exhibit NT3. The government has consistently maintained that Detective Paez is not and never was a target of any past or present investigation, or past or pending indictment, even in light of the information provided by Estrada and Garcia.

In addition, one critical prong of the Eleventh Circuit's standard for the granting of a new trial requires that any newly discovered evidence must not be either cumulative or impeaching. Clearly, the evidence obtained from Estrada and Garcia concerning Detective Paez's past falls squarely within the category of impeachment material. Under the Eleventh Circuit standard, a new trial would not be warranted.

The government also argues that the information conveyed to law enforcement by Estrada and Garcia did not fall under Brady in light of the divergence between each witness's account and due to the speculative nature of Detective Paez's purported statements to Estrada either as

stated by Estrada, or as related by Garcia. A prosecutor has no Brady obligation "to communicate preliminary, challenged, or speculative information" to the defense. Agurs, 427 U.S. at 109, n.16; United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996); United States v. Diaz, 922 F.2d 998, 1006 (2nd Cir.), cert. denied, 500 U.S. 925 (1991); Stang v. Dugger, 883 F.2d 900, 905 (11th Cir.), superseded, 901 F.2d 898 (11 th Cir. 1990).

In this matter prosecutors and agents separately debriefed both Estrada and Garcia. At those debriefings, Estrada and Garcia provided different accounts concerning Detective Paez. The government has repeated on this record and in pleadings filed with this court that Detective Paez is not under investigation nor subject to indictment nor was he ever under investigation in the River Cops probe. Indeed, Detective Paez remains an on-duty City of Miami detective investigating narcotics violations.

For the foregoing reasons, the Court finds that no Brady violation has occurred.

3. Indictment Properly Pled.

On July 6, 1995, Rodriguez filed a pro se Motion for New Trial Based on Newly Discovered Evidence. (DE. 1220). Rodriguez's counsel refused to adopt and argue the instant motion during the hearings held before this Court on December 18, 1996. See Transcript I, p.24.

Rodriguez asserts in his pro se motion that following the jury verdicts in this matter he discovered that the government failed to list the appropriate statutory section for the conspiracy count (Count I) in the superseding indictment. To support his

claim, Rodriguez attaches to the instant motion the first five pages of the superseding indictment which he purports contains the conspiracy count.

A review of the record reveals that Rodriguez is factually incorrect. Indeed, page six of the government's superseding indictment, which was not provided by Rodriguez as part of his attachment to his pro se motion, contains the last page of the conspiracy count (Count I) and clearly provides the necessary statutory reference to the narcotics conspiracy statute, 18 U.S.C. §846. (D.E. 416). Also, Rodriguez's instant motion for new trial fails as the above averments would not fall within the ambit of newly discovered evidence after trial. The superseding indictment was-available to Rodriguez several months before the trial in this matter. Even if Rodriguez's averments were true, Rodriguez could not demonstrate that the information was only discovered after trial when he was arraigned on the superseding indictment prior to trial. .

4. Validity of the Wiretap Affidavit Remains.

On May 2, 1995, Cuni filed an Amended and Renewed Motion for New Trial Based on Post Trial Motion to Suppress Fruits of Electronic Surveillance. (D.E. 1137). This motion has been adopted by all other defendants.

Cuni has proceeded on the instant motion renewing a Franks challenge to the wiretap affidavit by attacking the four confidential sources of information listed in the wiretap application. Cuni argues that Carlos Bello, one source of information, is a liar. Cuni argues that Carlos Bello Sr. (a source of information and father of Carlos Bello) has indicated

that he never testified as indicated on the affidavit. Cuni argues that Eduardo Macia (a third source), who has died since the pre-trial hearings, is a liar. Cuni finally argues that Javier Pelletier (the final source) has denied relating the information attributed to him in the affidavit.

Before the trial in this matter, this Court held a lengthy and extensive Franks hearing to explore allegations raised by Cuni concerning the wiretap affidavit. That hearing was held on August 10-12 and 15-25, 1995. Following the hearing, this Court issued a lengthy report recommending that Cuni's motion which triggered the Franks hearing be denied. (D.E. 686). After hearing argument from the parties, the district court issued a lengthy order adopting the undersigned's report and recommendation and denied Cuni's motion attacking the wiretap affidavit. (D.E. 766).

Cuni now seeks another try at a Franks hearing to attack Agent Lucas' affidavit in support of the wiretap. However, Cuni has failed again to demonstrate a deliberate or reckless misrepresentation or omission made by Agent Lucas at the time he swore to the affidavit before a district judge. At times, Cuni has attacked the underlying informants and presented evidence that they are liars and disreputable persons. However, the Supreme Court has cautioned that the deliberate falsity or reckless disregard permitted in the Franks hearing is only that of the affiant and not that of the underlying informant. Franks v. Delaware, 438 U.S. 154, 171 (1978); ewe, al so United States v. Smith, 918 F.2d 1501, 1508 (11lth Cir. 1990). A wiretap affidavit will be upheld unless evidence exists that the affiant knowingly or recklessly included false information in

the affidavit even though the information provided by an informant can be false. United States v. Olderbak, 961 F.2d 756, 760 (8th Cir.), cert. denied, 113 S.Ct. 442 (1992). Cuni has failed to present such compelling evidence.

Next, Cuni has painstakingly attempted to show Agent Lucas is of questionable veracity by preventing evidence from various convicted felons presently serving prison sentences concerning wholly unrelated investigations in which Agent Lucas worked on. Cuni's approach though intriguing, in that he is using convicted felons to attack the character of Agent Lucas, is highly misguided. Cuni has failed to show that Agent Lucas either lied or recklessly presented false testimony in the wiretap affidavit in this case.

With respect to Cuni's attacks on Agent Lucas as it relates to the instant motion, the Court would note that the government presented the testimony of City of Miami Detective Ralph Masferrer at the post-trial hearing. See Transcript III, pp. 222-286. Detective Masferrer was the co-case agent with Agent Lucas on this wiretap and as such was present at and participated in the debriefings of Eduardo Macia, Carlos Bello and Javier Pelletier. Detective Masferrer indicated that all the information contained in the affidavit and attributed to the informants was accurate and was told to both Agent Lucas and him by the informants. Again, Cuni has failed to show that Agent Lucas knew of any alleged false information or recklessly avoided knowing at the time he swore to the affidavit. See, e.g., United States v. Procopio, 88 F.3d 21, 26 (1st Cir. 1996).

These findings are consistent with earlier findings entered

into by this Court. The Court recently found that Cuni had presented "no arguably credible and\or legally viable claims" in the instant motion and that Cuni's instant motion was a thinly veiled attempt to keep digging with a Franks shovel in hopes of finding something somewhere. Order dated June 26, 1997. On several occasions during the post-trial hearing, itself, this Court previously advised the parties that Cuni's assertions concerning the informants were not newly discovered. See Transcript III, pp 192 and 252.

At one point, the Court questioned Cuni's counsel as to why he had not presented some of the allegations concerning the informants at the pre-trial hearing. Cuni's counsel responded:

> No. I did not call him at the Franks hearing. I was going to, but we ran out of time. I called him at trial.

See Transcript III, pp. 192-193. To the extent that the alleged new evidence underlying Cuni's instant Franks challenge was available to Cuni prior to trial by exercise of due diligence, Cuni's latest challenge is not newly discovered. United States v. Tibolt, 72 F.3d 965, 973 (1 st Cir. 1995).

At the pretrial hearing, Cuni knew of the identity of Eduardo Macia (one informant) and Carlos Bello and Carlos Bello Sr. (two other informants). Indeed, Cuni subpoenaed both Bellos to the pretrial hearing but for some reason never called them to testify. His failure to call those witnesses who he knew existed at the pretrial hearing prevents him from now claiming his evidence is newly discovered. United States v.

Beasley, 582 F.2d 337, 339 (5th Cir. 1978); United States v. Palmer, 766 F.2d 1441, 1446 (10th Cir. 1985).

Cuni also called Javier Pelletier to testify at the post-trial hearing. Pelletier claimed that he did not provide any information regarding Cuni to the agents who interviewed him and that he told the agents that all information was coming directly from information he received from Carlos Bello. Both assertions are contrary to information sworn to by Agent Lucas in the wiretap affidavit.

The government called DEA Agent Gary Wade who is currently the DEA's Chief of Congressional Affairs in Washington, D.C. See Transcript III, pp.301-318. During the time of the arrest in this matter, Agent Wade was the Acting Special Agent in Charge for DEA in Miami. Wade testified that after the arrest of the defendants in this cause, Pelletier came to him to complain about Agent Lucas. According to Wade, Pelletier complained that he was the "key person that supplied information in [Agent Lucas]' big case about the Bowl Bar (Cum's bar) and was not being paid for his information. See Transcript III, p.306. As stated above, Detective Masferrer testified that he actively participated in the debriefing of Pelletier; the affidavit in support of the wiretap accurately reflected the information received from Pelletier; and Pelletier personally told him (Masferrer) that the information came from Pelletier's direct knowledge. See Transcript III, pp. 228-229 & 236.

After viewing the testimony of all witnesses concerned, the Court accepts the testimony of Agent Wade and Detective Masferrer as it related to Cuni's instant motion regarding the

information provided by Pelletier. As stated above, in a criminal proceeding where the court also serves as the fact finder, it remains uniquely within the role of the court to judge the credibility of the witnesses. Thomas, 93 F.3d at 486; Stano, 51 F.3d at 944.

For the above stated reasons, the Court finds that Cuni's instant motion does not raise a cognizable claim which would merit the granting of a new trial.

OBJECTIONS

The parties have ten (10) days from the date of this Report and Recommendation within p which to serve and file written objections, if any, with the Honorable K. Michael Moore, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LaConte v. Dugger, 847 F.2d 745 (11th Cir.), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders. Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED on July 28, 1997, at Miami, Florida.

S/Linnea R. Johnson
LINNEA R. JOHNSON
United States Magistrate Judge

cc: The Honorable K. Michael Moore
all counsel of record

APPENDIX A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)		
	)	
v.	)	
	)	
FRANCISCO NOVATON,	)	CASE NO. 93-0597CR-MARCUS
a/k/a "Frank",	)	21 U.S.C. § 841(a)(1)
a/k/a "Frankie",	)	21 U.S.C. § 843
a/k/a "Mingo",	)	21 U.S.C. § 846
OSCAR CUNI,	)	21 U.S.C. § 848
JORGE LOPEZ,	)	18 U.S.C. § 2
REYNALDO RODRIGUEZ,	)	
a/k/a "Rey",	)	MAGISTRATE JUDGE TURNOFF
LUIS SARMIENTO,	)	
a/k/a Officer Luis Sarmiento,	)	
JOHN AYALA	)	
a/k/a "Junior",	)	
RAMON ROSELL,	)	**INDICTMENT**
a/k/a "Papito",	)	
CHARLES ANDERSON,	)	
a/k/a "Tuna",	)	
PEDRO DOMINGUEZ,	)	
a/k/a "Pelencho"	)	
JOSE DE LA UZ,	)	
MERCEDES NOVATON,	)	
HUMBERTO RODRIGUEZ,	)	

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a/k/a "Chino")
FELIPE MATAMOROS,)
LEOPOLDO RODRIGUEZ,)
ORLANDO MARTINEZ,)
a/k/a "Padrino",)
ANGELA WALKINE,)
a/k/a "Angie")
and)
FRANCISCO VELEZ,)
a/k/a "Frank")
_____)

The Grand Jury charges that:

COUNT ONE

From a date unknown to the Grand Jury, but at least by October 5, 1993 and continuing through December 10, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
OSCAR CUNI,
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
LUIS SARMIENTO,
JOHN AYALA,
a/k/a "Junior",

RAMON ROSELL,
a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino",
ANGELA WALKINE,
a/k/a "Angie"
and
FRANCISCO VELEZ,
a/k/a "Frank",

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute and to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

THE MANNER AND MEANS OF THE CONSPIRACY

The manner and means used by the conspirators to

accomplish the purpose of the conspiracy included the following:

1. The conspirators obtained, stored, supplied and distributed multi-kilogram quantities of cocaine.

2. The conspirators operated a cocaine distribution center using a house in a residential neighborhood.

3. Police officers from the City of Miami Police Department, at times while on official duty, provided protection and security for the cocaine distribution center. They also provided countersurveillance and passed on law enforcement information to other conspirators.

4. The conspirators communicated in code with each other to set up cocaine deals, deliver cocaine and receive money from the sale of cocaine using standard telephones, cellular telephones, and digital paging devices in order to avoid detection by law enforcement personnel.

ROLES OF CONSPIRATORS

1. Francisco Novaton was in charge of the cocaine distribution center operating out of his house in a residential neighborhood.

2. Oscar Cuni was the primary source of supply for multi-kilogram quantities of cocaine which the conspirators distributed.

3. City of Miami Police Detective Jorge Lopez and Police Officers Reynaldo Rodriguez and Luis Sarmiento provided protection, security and law enforcement information to members of the conspiracy.

4. Ramon Rosell, Jose De La Uz, Pedro Dominguez, and John Ayala provided cocaine to the distribution center and

collected money resulting from the sale, of cocaine.

5. Charles Anderson regularly purchased multi-kilogram quantities of cocaine for subsequent distribution.

6. Mercedes Novaton, Humberto Rodriguez, Felipe Matamoros, Leopoldo Rodriguez, Orlando Martinez, Angela Walkine and Francisco Velez helped store, guard, deliver and distribute cocaine.

OVERT ACTS

In furtherance of the conspiracy and in order to effect the objects thereof, the conspirators committed the following overt acts, among others, in the Southern District of Florida and elsewhere:

1. On October 12, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez provided security at 1780 N.W. 15th Street, Miami, Florida, the residence of Francisco Novaton, while the sale of cocaine took place.

2. On October 20, 1993, City of Miami Police Detective Jorge Lopez departed Francisco Novaton's residence with a radio scanner.

3. On October 22, 1993, City, of Miami Police Officer Reynaldo Rodriguez, together with Detective Jorge Lopez, operated a radio scanner at the residence of Francisco Novaton.

4. On October 23, 1993, City of Miami Police Detective Jorge Lopez telephoned the City of Miami Police Information Desk for information concerning a vehicle whose driver had earlier purchased cocaine from Francisco Novaton.

5. On October 26, 1993, City of Miami Police Detective

Jorge Lopez telephoned the City of Miami Complaint Desk to inquire about information concerning a residence which was searched by drug enforcement agents where four (4) kilograms of cocaine were seized.

8. On November 1, 1993, City of Miami Police Detective Jorge Lopez operated a radio scanner at Francisco Novaton's residence while a sale of cocaine took place.

9. On November 1, 1993, city of Miami Police Detective Jorge Lopez escorted Charles Anderson from the residence of Francisco Novaton using his unmarked City of Miami police vehicle after Charles Anderson completed a purchase of cocaine.

10. On November 9, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez obtained information from state court records pertaining to the arrest of Jose A. Varona for possession of eight (8) kilograms of cocaine purchased from Francisco Novaton and Oscar Cuni, which was then passed directly to members of the conspiracy by Officer Reynaldo Rodriguez.

11. On November 11, 1993, City of Miami Police Officer Reynaldo Rodriguez provided surveillance and protection for Francisco Novaton's residence while a sale of cocaine took place.

12. On November 14, 1993, City of Miami Police Officer Reynaldo Rodriguez accompanied Francisco Novaton following a cocaine transaction.

13. On November 18, 1993, City of Miami Police Officer Luis Sarmiento relayed information to Oscar Cuni about pending narcotics investigations against Oscar Cuni.

Officer Sarmiento also provided advice on how to file a grievance with the City of Miami Police Department in efforts to quash the pending narcotics investigation.

14. On November 18, 1993, City of Miami Police Officer Luis Sarmiento asked Oscar Cuni for money.

15. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez were sent by Francisco Novaton to find and retrieve John Ayala, a/k/a "Junior", after John Ayala, a/k/a "Junior" detected surveillance and abandoned his car which carried narcotics proceeds.

16. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Reynaldo Rodriguez provided counter surveillance for member of narcotics distribution conspiracy.

18. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez accepted free food, drinks and prostitutes from Oscar Cuni at the Bowl Bar.

19. On November 26, 1993, City of Miami Police Detective Jorge Lopez discussed with Oscar Cuni a narcotics debt owed by Francisco Novaton to Cuni.

20. On December 5, 1993, City of Miami Police Officer Reynaldo Rodriguez discussed with Oscar Cuni and Francisco Novaton a narcotics debt owed by Novaton to Cuni.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

From a date unknown to the Grand Jury, but at least by

October 5, 1993, and continuing through December 10, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
and
OSCAR CUNI,

did knowingly and intentionally engage in a continuing criminal enterprise by committing felony violations of Title 21, United States Code, including the violations set forth in Counts One, Two and Three through Eight of this Indictment, which are incorporated herein by reference, all of which were part of a continuing series of felony violations of Title 21, United States Code, Sections 841 and 846, which continuing series of violations were undertaken by the defendants in concert with at least five other persons with respect to whom the defendants occupied a position as organizer, supervisor or other position of management, and from which continuing series of violations the defendants obtained substantial income and resources; all in violation of Title 21, United States Code, Section 848.

COUNT THREE

On or about October 23, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"

a/k/a "Frankie"
a/k/a "Mingo"
OSCAR CUNI,
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
a/k/a "Rey"
LUIS SARMIENTO,
RAMON ROSELL,
a/k/a "Papito",
JOHN AYALA,
a/k/a "Junior",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
E a/k/a "Chino",
FELIPE MATAMOROS
and
LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

On or about October 26, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
RAMON ROSELL,
a/k/a "Papito",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
LEOPOLDO RODRIGUEZ
and
FELIPE MATAMOROS,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

On or about October 31, 1993, to on or about November 4, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON

a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
OSCAR CUNI,
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
a/k/a "Rey"
RAMON ROSELL,
a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino"
and
Angela Walkine,
a/k/a "Angie"

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine: in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code,

Section 2.

COUNT SIX

On or about November 6, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
a/k/a "Rey"
and
MERCEDES NOVATON,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

On or about November 7, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo" ,
JOSE DE LA UZ

and

LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT EIGHT

On or about November 16, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,

a/k/a "Frank",

a/k/a "Mingo",

JOHN AYALA,

a/k/a "Junior",

RAMON ROSELL,

a/k/a "Papito",

PEDRO DOMINGUEZ,

a/k/a "Pelencho"

and

JOSE DE LA UZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT NINE

On or about October 28, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ORLANDO MARTINEZ,
a/k/a "Padrino"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United States Code, Section 846.

COUNT TEN

On or about October 31, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ANGELA WALKINE,
a/k/a "Angie"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United states code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

COUNT ELEVEN

On or about October 29, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

FRANCISCO VELEZ,
a/k/a "Frank"

did knowingly and intentionally use a communication facility,

that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United States Code, Section 846.

FORFEITURE "1"

Upon the conviction of the defendant, FRANCISCO NOVATON, a/k/a "Frank", a/k/a "Frankie", a/k/a -Mingo", for violations of Title 21, United States Code, Sections 841, 846 and/or 848, the defendant,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",

shall forfeit to the United States:

1. Any and all property constituting and derived from any proceeds which the defendant FRANCISCO NOVATON, a/k/a "Frank", a/k/a "Frankie", a/k/a -Mingo-, obtained directly or indirectly.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
FRANCISCO NOVATON,	)	CASE NO. 93-0597CR-MARCUS(s)
a/k/a "Frank",	)	21 U.S.C. § 841(a)(1)
a/k/a "Frankie",	)	21 U.S.C. § 843
a/k/a "Mingo",	)	21 U.S.C. § 846
OSCAR CUNI,	)	21 U.S.C. § 848
JORGE LOPEZ,	)	18 U.S.C. § 2
REYNALDO RODRIGUEZ,	)	
a/k/a "Rey",	)	
LUIS SARMIENTO,	)	
JOHN.AYALA	)	
a/k/a "Junior",	)	**SUPERSEDING**
RAMON ROSELL,	)	**INDICTMENT**
a/k/a "Papito",	)	
CHARLES ANDERSON,	)	
a/k/a "Tuna",	)	
PEDRO DOMINGUEZ,	)	
a/k/a "Pelencho"	)	
JOSE DE LA UZ,	)	
MERCEDES NOVATON,	)	
HUMBERTO RODRIGUEZ,	)	
a/k/a "Chino"	)	

FELIPE MATAMOROS,)
LEOPOLDO RODRIGUEZ,)
ORLANDO MARTINEZ,)
a/k/a "Padrino",)
ANGELA WALKINE,)
a/k/a "Angie")
and)
FRANCISCO VELEZ,)
a/k/a "Frank")
)

The Grand Jury charges that:

COUNT ONE

From a date unknown to the Grand Jury, but at least by October 5, 1993 and continuing through December 10, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
OSCAR CUNI,
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
LUIS SARMIENTO,
JOHN AYALA,
a/k/a "Junior",
RAMON ROSELL,
a/k/a "Papito",

CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino",
ANGELA WALKINE,
a/k/a "Angie"
and
FRANCISCO VELEZ,
a/k/a "Frank",

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute and to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

THE MANNER AND MEANS OF THE CONSPIRACY

The manner and means used by the conspirators to accomplish the purpose of the conspiracy included the following:

1. The conspirators obtained, stored, supplied and

distributed multi-kilogram quantities of cocaine.

2. The conspirators operated a cocaine distribution center using a house in a residential neighborhood.

3. Police officers from the City of Miami Police Department, at times while on official duty, provided protection and security for the cocaine distribution center. They also provided counter-surveillance and passed on law enforcement information to other conspirators.

4. The conspirators communicated in code with each other to set up cocaine deals, deliver cocaine and receive money from the sale of cocaine using standard telephones, cellular telephones, and digital paging devices in order to avoid detection by law enforcement personnel.

ROLES OF CONSPIRATORS

1. Francisco Novaton was in charge of the cocaine distribution center operating out of his house in a residential neighborhood.

2. Oscar Cuni was the primary source of supply for multi-kilogram quantities of cocaine which the conspirators distributed.

3. City of Miami Police Detective Jorge Lopez and Police Officers Reynaldo Rodriguez and Luis Sarmiento provided protection, security and law enforcement information to members of the conspiracy.

4. Ramon Rosell, Jose De La Uz, Pedro Dominguez, and John Ayala provided cocaine to the distribution center and collected money resulting from the sale, of cocaine.

5. Charles Anderson regularly purchased multi-kilogram quantities of cocaine for subsequent distribution.

6. Mercedes Novaton, Humberto Rodriguez, Felipe Matamoros, Leopoldo Rodriguez, Orlando Martinez, Angela Walkine and Francisco Velez helped store, guard, deliver and distribute cocaine.

OVERT ACTS

In furtherance of the conspiracy and in order to effect the objects thereof, the conspirators committed the following overt acts, among others, in the Southern District of Florida and elsewhere:

1. On October 12, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez provided security at 1780 N.W. 15th Street, Miami, Florida, the residence of Francisco Novaton, while the sale of cocaine took place.

2. On October 20, 1993, City of Miami Police Detective Jorge Lopez departed Francisco Novaton's residence with a radio scanner.

3. On October 22, 1993, City, of Miami Police Officer Reynaldo Rodriguez, together with Detective Jorge Lopez, operated a radio scanner at the residence of Francisco Novaton.

4. On October 23, 1993, City of Miami Police Detective Jorge Lopez telephoned the City of Miami Police Information Desk for information concerning a vehicle whose driver had earlier purchased cocaine from Francisco Novaton.

5. On October 26, 1993, City of Miami Police Detective Jorge Lopez telephoned the City of Miami Complaint Desk to inquire about information concerning a residence which was searched by drug enforcement agents where four (4) kilograms

of cocaine were seized.

8. On November 1, 1993, City of Miami Police Detective Jorge Lopez operated a radio scanner at Francisco Novaton's residence while a sale of cocaine took place.

9. On November 1, 1993, city of Miami Police Detective Jorge Lopez escorted Charles Anderson from the residence of Francisco Novaton using his unmarked City of Miami police vehicle after Charles Anderson completed a purchase of cocaine.

10. On November 9, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez obtained information from state court records pertaining to the arrest of Jose A. Varona for possession of eight (8) kilograms of cocaine purchased from Francisco Novaton and Oscar Cuni, which was then passed directly to members of the conspiracy by Officer Reynaldo Rodriguez.

11. On November 11, 1993, City of Miami Police Officer Reynaldo Rodriguez provided surveillance and protection for Francisco Novaton's residence while a sale of cocaine took place.

12. On November 14, 1993, City of Miami Police Officer Reynaldo Rodriguez accompanied Francisco Novaton following a cocaine transaction.

13. On November 18, 1993, City of Miami Police Officer Luis Sarmiento relayed information to Oscar Cuni about pending narcotics investigations against Oscar Cuni. Officer Sarmiento also provided advice on how to file a grievance with the City of Miami Police Department in efforts to quash the pending narcotics investigation.

14. On November 18, 1993, City of Miami Police Officer Luis Sarmiento asked Oscar Cuni for money.

15. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez were sent by Francisco Novaton to find and retrieve John Ayala, a/k/a "Junior", after John Ayala, a/k/a "Junior" detected surveillance and abandoned his car which carried narcotics proceeds.

16. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Reynaldo Rodriguez provided counter surveillance for member of narcotics distribution conspiracy.

18. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez accepted free food, drinks and prostitutes from Oscar Cuni at the Bowl Bar.

19. On November 26, 1993, City of Miami Police Detective Jorge Lopez discussed with Oscar Cuni a narcotics debt owed by Francisco Novaton to Cuni.

20. On December 5, 1993, City of Miami Police Officer Reynaldo Rodriguez discussed with Oscar Cuni and Francisco Novaton a narcotics debt owed by Novaton to Cuni.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

From a date unknown to the Grand Jury, but at least by October 5, 1993, and continuing through December 10, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
and
OSCAR CUNI,

did knowingly and intentionally engage in a continuing criminal enterprise by committing felony violations of Title 21, United States Code, including the violations set forth in Counts One, Two and Three through Eight of this Indictment, which are incorporated herein by reference, all of which were part of a continuing series of felony violations of Title 21, United States Code, Sections 841 and 846, which continuing series of violations were undertaken by the defendants in concert with at least five other persons with respect to whom the defendants occupied a position as organizer, supervisor or other position of management, and from which continuing series of violations the defendants obtained substantial income and resources; all in violation of Title 21, United States Code, Section 848.

COUNT THREE

On or about October 23, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
OSCAR CUNI,
JORGE LOPEZ,

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REYNALDO RODRIGUEZ,
a/k/a "Rey"
LUIS SARMIENTO,
RAMON ROSELL,
a/k/a "Papito",
JOHN AYALA,
a/k/a "Junior",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
E a/k/a "Chino",
FELIPE MATAMOROS
and
LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in
violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

On or about October 26, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"

a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
RAMON ROSELL,
a/k/a "Papito",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
LEOPOLDO RODRIGUEZ
and
FELIPE MATAMOROS,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

On or about October 31, 1993, to on or about November 4, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
OSCAR CUNI,
JORGE LOPEZ,

REYNALDO RODRIGUEZ,
a/k/a "Rey"
RAMON ROSELL,
a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino"
and
Angela Walkine,
a/k/a "Angie"

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine: in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SIX

On or about November 6, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON

a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
REYNALDO RODRIGUEZ,
a/k/a "Rey"
and
MERCEDES NOVATON,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

On or about November 7, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo" ,
JOSE DE LA UZ
and
LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code,

Section 2.

COUNT EIGHT

On or about November 16, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Mingo",
JOHN AYALA,
a/k/a "Junior",
RAMON ROSELL,
a/k/a "Papito",
PEDRO DOMINGUEZ,
a/k/a "Pelencho"
and
JOSE DE LA UZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT NINE

On or about October 28, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ORLANDO MARTINEZ,
a/k/a "Padrino"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United

States Code, Section 846.

COUNT TEN

On or about October 31, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ANGELA WALKINE,

a/k/a "Angie"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United states code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

COUNT ELEVEN

On or about October 29, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

FRANCISCO VELEZ,

a/k/a "Frank"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
FRANCISCO NOVATON,	)	CASE NO. 93-597-Cr-MARCUS(s)(s)
a/k/a "Frank",	)	21 U.S.C. § 841(a)(1)
a/k/a "Frankie",	)	21 U.S.C. § 843(b)
a/k/a "Mingo",	)	21 U.S.C. § 846
OSCAR CUNI,	)	21 U.S.C. § 848
JORGE LOPEZ,	)	18 U.S.C. § 924 (c)(1)
a/k/a "Joey",	)	18 U.S.C. § 2
REYNALDO RODRIGUEZ,	)	
a/k/a "Rey",	)	
LUIS SARMIENTO,	)	
JOHN.AYALA	)	
a/k/a "Junior",	)	**SUPERSEDING**
RAMON ROSELL,	)	**INDICTMENT**
a/k/a "Papito",	)	
CHARLES ANDERSON,	)	
a/k/a "Tuna",	)	
PEDRO DOMINGUEZ,	)	
a/k/a "Pelencho"	)	
JOSE DE LA UZ,	)	
MERCEDES NOVATON,	)	
HUMBERTO RODRIGUEZ,	)	

Filed by _____ D.C.

MAY 27 1994

T.G. CHELEOTIS
CLERK U.S. DIST. COT
S.D. OF FLA. - MIAMI

a/k/a "Chino")
FELIPE MATAMOROS,)
LEOPOLDO RODRIGUEZ,)
ORLANDO MARTINEZ,)
a/k/a "Padrino",)
ANGELA WALKINE,)
a/k/a "Angie")
and)
FRANCISCO MONTALVO,)
a/k/a "Frank")
_____)

The Grand Jury charges that:

COUNT ONE

From a date unknown to the Grand Jury, but at least by August 1, 1993 and continuing through December 13, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a 'Frank",
a/k/a "Frankie",
a/k/a "Mingo",
OSCAR CUNI, JORGE LOPEZ,
a/k/a "Joey",
REYNALDO RODRIGUEZ,
LUIS SARMIENTO,
JOHN AYALA,
a/k/a "Junior",
RAMON ROSELL,

a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino",
ANGELA WALKINE,
a/k/a "Angie"
and
FRANCISCO MONTALVO,
a/k/a "Frank",

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute and to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

THE MANNER AND MEANS OF THE CONSPIRACY

The manner and means used by the conspirators to accomplish the purpose of the conspiracy included the following:

1. The conspirators obtained, stored, supplied and distributed multi-kilogram quantities of cocaine.

2. The conspirators operated a cocaine distribution center using a house in a residential neighborhood.

3. Police officers from the City of Miami Police Department, at times while on official duty, provided protection and security for the cocaine distribution center. They also provided counter-surveillance and passed on law enforcement information to other conspirators.

4. The conspirators communicated in code with each other to set up cocaine deals, deliver cocaine and receive money from the sale of cocaine using standard telephones, cellular telephones, and digital paging devices in order to avoid detection by law enforcement personnel.

ROLES OF CONSPIRATORS

1. Francisco Novaton was in charge of the cocaine distribution center operating out of his house in a residential neighborhood.

2. Oscar Cuni was the primary source of supply for multi-kilogram quantities of cocaine which the conspirators distributed.

3. City of Miami Police Detective Jorge Lopez and Police Officers Reynaldo Rodriguez and Luis Sarmiento provided protection, security and law enforcement information to members of the conspiracy.

4. Ramon Rosell, Jose De La Uz, Pedro Dominguez, and John Ayala provided cocaine to the distribution center and collected money resulting from the sale of cocaine.

5. Charles Anderson regularly purchased multi-kilogram

quantities of cocaine for subsequent distribution.

6. Mercedes Novaton, Humberto Rodriguez, Felipe Matamoros, Leopoldo Rodriguez, Orlando Martinez, Angela Walkine and Francisco Montalvo helped store, guard, deliver and distribute cocaine.

OVERT ACTS

In furtherance of the conspiracy and in order to effect the objects thereof, the conspirators committed the following overt acts, among others, in the Southern District of Florida and elsewhere:

1. On August 3, 1993, City of Miami Police Officer Luis Sarmiento placed an individual under his custody and transported that individual in his marked police unit to Cuni Motors, Inc.

2. On August 3, 1993, City of Miami Police Officer Luis Sarmiento, together with Oscar Cuni, interrogated an individual in the office at Cuni Motors, Inc.

3. On October 12, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez provided security at 1780 N.W. 15th Street, Miami, Florida, the residence of Francisco Novaton, while the sale of cocaine took place.

4. On October 20, 1993, City of Miami Police Detective Jorge Lopez departed Francisco Novaton's residence with a radio scanner.

5. On October 22, 1993, City of Miami Police Officer Reynaldo Rodriguez, together with Detective Jorge Lopez, operated a radio scanner at the residence of Francisco Novaton.

6. On October 23, 1993, City of Miami Police Detective Jorge Lopez telephoned the City of Miami Police Information Desk for information concerning a vehicle whose driver had earlier purchased cocaine from Francisco Novaton.

7. On October 26, 1993, City of Miami Police Detective Jorge Lopez telephoned the City of Miami Complaint Desk to inquire about information concerning a residence which was searched by drug enforcement agents where four (4) kilograms .of cocaine were seized.

8. On November 1, 1993, City of Miami Police Detective Jorge Lopez operated a radio scanner at Francisco Novaton's residence while a sale of cocaine took place.

9. On November 1, 1993, City of Miami Police Detective Jorge Lopez escorted Charles Anderson from the residence of Francisco Novaton using his unmarked City of Miami police vehicle after Charles Anderson completed a purchase of cocaine.

10. On November 9, 1993, City of Miami Police Detective Jorge Lopez and Officer Reynaldo Rodriguez obtained information from state court records pertaining to the arrest of Jose A. Varona for possession of eight (8) kilograms of cocaine purchased from Francisco Novaton and Oscar Cuni, which was then passed directly to members of the conspiracy by Officer Reynaldo Rodriguez.

11. On November 11, 1993, City of Miami Police Officer Reynaldo Rodriguez provided surveillance and protection for Francisco Novaton's residence while a sale of cocaine took place.

12. On November 14, 1993, City of Miami Police

Officer Reynaldo Rodriguez accompanied Francisco Novaton following a cocaine transaction.

13. On November 18, 1993, City of Miami Police Officer Luis Sarmiento relayed information to Oscar Cuni about pending narcotics investigations against Oscar Cuni. Officer Sarmiento also provided advice on how to file a grievance with the City of Miami Police Department in efforts to quash the pending narcotics investigation.

14. On November 18, 1993, City of Miami Police Officer Luis Sarmiento asked Oscar Cuni for money.

15. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez were sent by Francisco Novaton to find and retrieve John Ayala, a/k/a "Junior", after John Ayala, a/k/a "Junior" detected surveillance and abandoned his car which carried narcotics proceeds.

16. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Reynaldo Rodriguez provided counter surveillance for member of the narcotics distribution conspiracy.

17. On November 20, 1993, City of Miami Police Detectives Jorge Lopez and Officer Reynaldo Rodriguez accepted free food, drinks and prostitutes from Oscar Cuni at the Bowl Bar.

18. On November 26, 1993, City of Miami Police Detective Jorge Lopez discussed with Oscar Cuni a narcotics debt owed by Francisco Novaton to Cuni.

19. On December 5, 1993, City of Miami Police Officer Reynaldo Rodriguez discussed with Oscar Cuni and Francisco

Novaton a narcotics debt owed by Novaton to Cuni.

All in violation of Title 21, United States Code, Section 846.6

COUNT TWO

From a .date unknown to the Grand Jury, but at least by August 1, 1993, and continuing through December 10, 1993, in Miami, Dade County, within the Southern District of Florida, and elsewhere, the defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
and
OSCAR CUNI,

did knowingly and intentionally engage in a continuing criminal enterprise by committing felony violations of Title 21, United States Code, including the violations set forth in Counts One, Two, Three through Eight and Twelve through Fifteen of this Indictment, which are incorporated herein by reference, all of which were part of .a continuing series of felony violations of Title 21, United States Code, Sections 841, 843(b) and 846, which continuing series of violations were undertaken by the defendants in concert with at least five other persons with respect to whom the defendants occupied a position as organizer, supervisor or other position of management, and from which continuing series of violations the defendants obtained substantial income and resources, all in violation of Title 21, United States Code, Section 848.

COUNT THREE

On or about October 23, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo",
JORGE LOPEZ,
a/k/a "Joey",
REYNALDO RODRIGUEZ,
a/k/a "Rey",
RAMON ROSELL,
a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS
and
LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

On or about October 26, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
a/k/a "Joey",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
LEOPOLDO RODRIGUEZ
and
FELIPE MATAMOROS,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

On or about October 31, 1993, to on or about November 4, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"

a/k/a "Mingo"
OSCAR CUNI,
JORGE LOPEZ,
aka "Joey",
REYNALDO RODRIGUEZ,
a/k/a "Rey"
RAMON ROSELL,
a/k/a "Papito",
CHARLES ANDERSON,
a/k/a "Tuna",
PEDRO DOMINGUEZ,
a/k/a "Pelencho",
JOSE DE LA UZ,
MERCEDES NOVATON,
HUMBERTO RODRIGUEZ,
a/k/a "Chino",
FELIPE MATAMOROS,
LEOPOLDO RODRIGUEZ,
ORLANDO MARTINEZ,
a/k/a "Padrino"
and
Angela Walkine,
a/k/a "Angie"

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine: in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SIX

On or about November 6, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON
a/k/a "Frank"
a/k/a "Frankie"
a/k/a "Mingo"
JORGE LOPEZ,
a/k/a "Joey"
REYNALDO RODRIGUEZ,
a/k/a "Rey"
and
MERCEDES NOVATON,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SEVEN

On or about November 7, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Frankie",
a/k/a "Mingo" ,
JOSE DE LA UZ
and
LEOPOLDO RODRIGUEZ,

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT EIGHT

On or about November 18, 1993, in Miami, Dade County, in the Southern District of Florida, defendants,

FRANCISCO NOVATON,
a/k/a "Frank",
a/k/a "Mingo",
and
JOHN AYALA,
a/k/a "Junior",

did knowingly and intentionally possess with intent to distribute and distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT NINE

From on or about October 5, 1993, to on or about December 13, 1993, at Miami, Dade County, in the Southern District of Florida, the defendant,

JORGE LOPEZ,
a/k/a "Joey",

knowingly carried a firearm, that is, a 9mm Glock semi-automatic pistol, during and in relation to a drug trafficking

crime as proscribed in Title 18, United States Code, Section 846, and as set forth in Count One of this Indictment, for which defendant may be prosecuted in a court of the United States; in violation of Title 18, United States Code, Section 924(c)(1).

COUNT TEN

From on or about October 5, 1993, to on or about December 13, 1993, at Miami, Dade County, in the Southern District of Florida, the defendant,

REYNALDO RODRIGUEZ,

a/k/a "Rey",

knowingly carried a firearm, that is, a 9mm Glock semi-automatic pistol, during and in relation to a drug trafficking crime as proscribed in Title 18, United States Code, Section 846, and as set forth in Count One of this Indictment, for which defendant may be prosecuted in a court of the United States; in violation of Title 18, United States Code, Section 924(c)(1).

COUNT ELEVEN

On or about August 3, 1993, at Miami, Dade County, in the Southern District of Florida, the defendant,

LUIS SARMIENTO,

knowingly carried a firearm, that is, a Glock 9mm semi-automatic pistol, during and in relation to a drug trafficking crime as proscribed in Title 18, United States Code, Section 846, and as set forth in Count One of this Indictment, for which defendant may be prosecuted in a court of the United States; in violation of Title 18, United States Code, Section 924(c)(1).

COUNT TWELVE

On or about October 28, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ORLANDO MARTINEZ,

a/k/a "Padrino"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United 12 States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

COUNT THIRTEEN

On or about October 31, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

ANGELA WALKINE,

a/k/a "Angie"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United states code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

COUNT FOURTEEN

On or about October 29, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

FRANCISCO MONTALVO

a/k/a "Frank"

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and

facilitating the commission of a felony, that is, a violation of Title 21, United States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

COUNT FIFTEEN

On or about October 20, 1993, in Miami, Dade County, in the Southern District of Florida, the defendant,

LUIS SARMIENTO,

did knowingly and intentionally use a communication facility, that is, a telephone, in committing, causing and facilitating the commission of a felony, that is, a violation of Title 21, United States Code, Section 846.

In violation of Title 21, United States Code, Section 843(b).

APPENDIX A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 93-418-CR-GRAHAM
	)	
	)	
MARIO M. GONZALEZ, et al.	)	OMNIBUS OPPOSITION BY THE UNITED STATES TO VARIOUS PENDING MOTIONS
	)	
	)	
	)	
	)	

The United States of America, by and through the undersigned Assistant United States Attorney, hereoy opposes and addresses the following pending motions: (1) Defendant Mario M. GONZALEZ' Motion for Bill of Particulars; (2) Defendant Pedro MARTIN' s Motion for Bill of Particulars; and (3) Defendant Mario M. GONZALEZ' Motion for Exculpatory Evidence. The bases for this omnibus opposition are set forth below.

A. Defendants Have Been Provided with a Sufficient Bill of Particulars.

1. Defendant Pedro MARTIN

Defendant MARTIN filed a motion for a "Bill of Particulars" seeking (1) the identities of all known co-

conspirators, (2) the date, time and place of the "overt acts" committed by defendant MARTIN and (3) any Rule 404(b) evidence.

The Court, by Order dated July 13, 1994, granted this motion to the extent required by the Standing Discovery Order (SDO). Defendant Nilda ALBERTO filed similar requests in her Bill of Particulars of Julv 5, 1994. By Order dated July 11, 1994, this Court denied defendant ALBERTO's motion except in so far as it requested a list of known and unknbwn co-conspirators.

In the government's First Supplemental Response to the SDO filed on March 22, 1994, defendant MARTIN was advised that his criminal arrest history as reflected in the Pre-Trial Services report would be subject to admission as Rule 404(b) evidence. At defendant MARTIN's pre-trial detention hearing conducted on February 9, 1994, defendant MARTIN's criminal arrest and conviction history was addressed in great detail. Defendant MARTIN is in possession of a transcript of that proceeding. See Exhibit B to defendant MARTIN's Motion for Reconsideration of Pre-Trial Detention Order. As such, the United States is in full compliance with the SDO's Rule 404(b) notice requirements.

With respect to defendant MARTIN's request for a list of the date, time and place of all "overt acts" in furtherance of the conspiracy, the government has complied with all Court Orders in that regard.

In response to the Court's Omnibus Order of, August 30, 1994, on September 13, 1994, and with a Supplemental Response filed on September 16, 1994, the United States

advised all parties of the location in the discoverv as to the known dates of the narcotics transactions, the dates of receipt and acquisition of assets and the dates of pertinent travel and lodging during the conspiracy. The Court's August 30, 1990 Order is broader than the requirements of the SDO and has been complied with fully.

Finally, defendant MARTIN has requested a list of all known co-conspirators. Such lists are required neither under the SDO nor under the law in this Circuit. Generalized discovery is not a proper function of a Bill of Particulars. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981). Moreover, a defendant is not entitled to a Bill of Particulars "with respect to information which is already available through other sources." United States v. Martel, 906 F. 2d 555, 558 (11th Cir. 1990). See also Omnibus Response to Defendants' Motions filed on August 1, 1994, at pp. 23.

Here, the indictment has set forth in detail the terms of the conspiracy, twelve overt acts and the substantive charges against defendants. This is acequate notice to defendants which provides them with a full and fair opportunity to prepare their defenses. See United States v. Warren, 772 F.2d 827, 837 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986). Defendants have also been provided with substantial discovery which identifies essentially all the conspirators. Nevertheless, in an abundance of caution and to the extent that defendant MARTIN has not read the discovery, the government will restate those individuals, other than the charged co-conspirators, who may have furthered the objects of charged conspiracy: Rolando Santos, Rene Gomez, Frank Quintero,

Michael Blacker, Lori Perdomo, Ernesto Menendez, Maria del Carmen Gonzalez, Marlene Iza, Nelson Valdez Prieto, Sarah Canales, Lazaro Diaz, Freddy Borges, Roberto Quintero, Maritza Gonzalez and Antonio Gonzalez. See defendant Nilda ALBERTO's Motion of Bill of Particulars, paragraph 2.a and July 11, 1994 Order. Because of the wide ranging nature of the charged conspiracy and the duration of time in which it existed, it is impossible to be aware of all coconspirators.

2. Defendant Mario M. GONZALEZ

Defendant Mario M. GONZALEZ has requested a Bill of Particulars requesting thirty (30) different particularized statements regarding the charged offenses. By Order dated July 11, 1994, this Court denied a similar discovery expedition filed by defendant Nilda ALBERTO. In its omnibus response to various motions filed by the United States on August 1, 1994, the government generally addressed its reasons for opposing the various Bills of Particulars filed in this case. However, the government has set forth above further legal bases for denying defendant Mario M. GONZALEZ' request herein. Accordingly, the United States would rely upon the previously cited authorities and this Court's Order of July 11, 1994, in requesting denial of defendant Mario M. GONZALEZ' generalized request for a bill of particulars.

B. The Motion for Exculpatory Evidence.

Defendant Mario M. GONZALEZ has roved for "exculpatory evidence" possessed by the government. various other defendants have filed similar motions which have been granted to the extent provided by the SDO. See Order re Henry ALBERTO dated July 13, 1994; Order re Kathy

GALLEGO dated July 13, 1994; Order re Nilda ALBERTO dated July 13, 1994; Order re Lourdes MARIN dated October 13, 1993; Order re Tanya GARCIA dated July 25, 1994. The government is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) as sec forth in the SDO and intends to fully comply. The United States has no objections to granting defendant Mario M. GONZALEZ' motion to the extent required by the SDO.

CONCLUSION

Accordingly, the Motions for Bills of Particular should be denied in part on the merits and denied in part as moot. Defendant GONZALEZ' Motion for Exculpatory Evidence should be granted to the extent required under the SDO.

Respectfully submitted,

KENDALL COFFEY
UNITED STATES ATTORNEY

By: S/Paul Pelletier
PAUL E. PELLETIER
ASSISTANT UNITED STATES ATTORNEY
COURT ID NO. A5500047
99 NE 4th Street
Miami, Florida 33132
(305) 536-6591

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18th day of October, 1994 to:

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S/Paul E. Pelletier
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ASSISTANT UNITED
STATES ATTORNEY

AN EXCERPT OF THE DISCOVERY #124 THAT WAS USED IN THE CASE OF U.S. VS. MARIO GONZALEZ, WHERE ON THE DATE OF THE ARREST OF DEFENDANT GONZALEZ, THE D.E.A. AGENTS CONFISCATED AS EVIDENCE |SIX LISTS OF ALLEGED DRUG TRANSACTIONS|, WHERE ATTORNEY MICHAEL BLACKER'S NAME APPEARS AS ONE OF THE RECIPIENTS OF $5,000.00 ON TWO SEPARATE OCCASIONS.

Total	103	
Chamaco	- 24	
	79	
Pago, <illegible>	- 3	
	76	
<illegible>	- 1	
	75	
Pago, $80,000	- 5	
	70	
	÷ 3	
	25	- 3 Mary

454

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1) 6 24 + 16 = 384,000
2) 8 <illegible>
3) 10

Scorpion	5000	Jesus <illegible>	1000
Toro	1000	Jesus <illegible>	6000
Flete	50000	Jesus	1000
Majan	4000	Total	$203300
Corsa	5000	Titi	9700
Paisa	25000	Muerto	4300
Paisa	10000	Telefono	13700
Telefono	4800	"	19900
Telefono	5000	"	50000
<illegible>	4000	"	10000
Majan	900	"	10000
Joey	3500	"	35000
Muerto	15000	"	50000
Paisa	15000	"	7500
Telefono	7000	**Black Lawyer**	**5000**
Black Lawyer	**5000**		$ 203300
Muerto	2000	Cash	155000
<illegible>	2000		358300
Radio	7500	Cash	19000
Titi	3700		377300
Majan	5000		6700
Muerto	18000		384000
Tele J.T.	3200		

Jesus Props	1000
Jesus	37000
Mayo	100000
Radio	2000
Titi	500
Flete Flaco	32500

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Mike Black 285-0900